86-1190

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

R. E. FRAVER; J. RIVES MANNING, JR.; J. C. FAUST; HUBERT HAMPTON MARTIN; WILLIAM A. PLEASANT; C. B. WEATHERLY, JR.; LEE WILLIAMS; JIMMY MCELREATH; MIKE STEINER; DAVID MARION; JAMES K. WRIGHT; WILLIAM A. DAVENPORT, JR.; MAX F. ROBERTS; TED BRIGHT; BILLY RAY STALEY; WILLIAM SAMUEL KIRBY; HERBERT M. SPEAS, JR.; ROBERT L. DOBBINS; LINDA G. HAMRICK; EDWARD L. LOWDER; RON WORTHINGTON; DAVID BREEDEN; PEGGY HORNEY; HARRY HORNEY; ROBERT G. WOMBLE,

Petitioners,

— against —

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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192pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit misinterpret the Employee Retirement Income Security Act of 1974 by holding that a uniform, company-wide program of retirement benefits maintained by the employer was not a "plan, fund or program" subject to that statute? Yes.

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IN THE
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Petitioners

- Against -

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Inc.,

Respondent

* * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

* * * * * * * * * *

Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, dated September 18, 1986 (App. A, infra A-1) is reported at ___ F.2d ___ (4th Cir. 1986). It reverses the Judgment of United States District Court for the Eastern District of North Carolina, which Judgment is contained in two separate Opinions and Orders of that Court issued in 1984 and 1985. (Apps. B and C, infra A-16 and A-51). A Motion for Rehearing and Suggestion for Rehearing in Banc was denied by the Fourth Circuit on October 21, 1986. (App. D, infra A-111).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered September 18, 1986. A-1. The Petition for Rehearing and Suggestion for Rehearing In Banc was denied on October 21, 1986. A-111. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The United States District Court for the Eastern District of North Carolina had jurisdiction in the first instance over this action under 29 U.S.C.A. Section 1132(e)(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Employee Retirement Income Security Act of 1974, [hereinafter referred to as "ERISA"], 29 U.S.C.A. Section 1001(a), provides in relevant part:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that the continued well-being and security of

> millions of employees and their dependents are directly affected by these plans; . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

Section 3(2)(A) of the ERISA, 29 U.S.C.A. Section 1002(2)(A) provides in relevant part that:

> The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer... to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program-
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.
>
> Section 201 of ERISA, 29 U.S.C.A.

Section 1051, provides in relevant part that:

> This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than -
>
> . . .
>
> (5) Any agreement providing payments to a retired partner or a deceased partner's successor in interest, as described in section 736 of Title 26.
>
> Section 203(a) of ERISA, 29 U.S.C.A.

Section 1053(a) provides in relevant part that:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights and his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(The statute at this point details three alternative minimum vesting schedules with which a plan must comply. These alternative schedules are described in the Appendix, below, in footnotes at pages A-47 and A-141-142.)

REGULATIONS INVOLVED

Regulations promulgated by the Secretary of Labor, 29 C.F.R. Section 2510.3-2(b) provide in relevant part:

(b) Severance Pay Plans. (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or a pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed

> the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and
>
> (iii) All such payments to any employee are completed,
>
> (A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and
>
> (B) In the case of all other employees within 24 months after the termination of the employee's service.

STATEMENT OF THE CASE

Petitioners are all former insurance sales personnel for the Defendant, North Carolina Farm Bureau Mutual Insurance Company [hereinafter referred to as "Farm Bureau" or "the Company"]. All of the Plaintiffs, in accepting employment with the Farm Bureau, entered identical form

contracts containing a "Death, Disability and Retirement Benefits" package. This benefits package was identical (with slight variations which the District Court found insignificant as a factual matter) for all the Plaintiffs, and indeed, was identical for all members for the Farm Bureau's agency force, which at any given time numbered approximately 400 people. The program had been created by Farm Bureau management roughly in the late 1950's or early 1960's and has remained in effect continuously since then, extending to every Farm Bureau sales agent during the period.

The terms of the employment contracts, including the retirement program, were not subject to individual negotiation, and indeed, not even the highest official in the Farm Bureau's sales division had any authority to alter the form language in individual cases.

The retirement benefits were payable in equal monthly installments over either a 5 or 10 year period (the contracts varied in that regard) and in the event of nonpayment by the Company the retired agent had to look to the Farm Bureau's general assets for payment, since the program had no separate "fund" to the pay the benefits. The Farm Bureau attempted to recoup payments to the retired agent by making deductions from the commissions of the new agent who replaced him. But payments to the retired agent were in no way contingent upon a replacement being hired, and the Farm Bureau remained liable for the full benefits to the retired agent regardless of any commissions being deducted from a new agent. There was no contract between the retired agent and any new agent regarding the benefits. Although the Farm Bureau typically deducted this money from the

new agents, the Farm Bureau also had a program to increase the normal commissions of new agents and/or pay them a fixed monthly stipend for their first few years so as to keep them solvent.

In order to qualify to receive benefits under the retirement program, an agent must have been employed by the Farm Bureau for at least five years. But the program also contained a "bad-boy" clause calling for forfeiture of the benefits if the recipient became relicensed to sell insurance during the payout period. When the Plaintiffs became relicensed and were denied their benefits, they brought suit, claiming that the "bad-boy" clause violated the nonforfeitability provisions for retirement plans under Section 203(a) of ERISA, 29 U.S.C.A. 1053(a).

The District Court agreed with the Plaintiffs and held that the "bad-boy" clause was unenforceable under ERISA. A-

46-48; A-107. On appeal by the Farm Bureau, the United States Court of Appeals for the Fourth Circuit reversed that decision, saying that the retirement program was not a "plan" protected by ERISA but rather was a series of "individual contracts." A-1-15.

Because the Fourth Circuit decided the case on this threshold issue, it did not reach a number of other issues which had been brought before it on appeal from the District Court. In particular, from the standpoint of Petitioners, ERISA provides three different schedules to determine what percentage of the promised benefits must be nonforfeitable. See ERISA Section 203(a), 29 U.S.C.A. Section 1053(a). Judge Fox in the District Court held one of these schedules to be applicable to the Plaintiffs, which had the effect of eliminating some of them from recovering. Plaintiffs believe that

Judge Fox followed the wrong criteria for choosing between the different vesting schedules and that he should have chosen a different one which would have given a proportional recovery to all of the Plaintiffs. The Fourth Circuit, as stated, never reached this issue. The Fourth Circuit also never reached an issue raised by Plaintiffs as to whether a statute of limitations had expired against one of them, William A. Pleasant.

REASONS FOR GRANTING THE WRIT

Plaintiffs submit that (1) in finding the Plaintiffs' retirement program to be "individual contracts" and not a "plan", the Fourth Circuit contradicted its own earlier ruling in Darden v. Nationwide Mutual Insurance Company, et al., No. 85-1623 (4th Cir., July 15, 1986), leaving a confused state of interpretation of an important federal statute; and (2) the Fourth Circuit's

interpretation of ERISA is contrary to the statute's terms, its legislative history, and its purposes and so warrants review by the Supreme Court in light of the importance of the issue, on which the Supreme Court has not spoken; and (3) in its decision in the present case the Fourth Circuit has interpreted ERISA in a manner inconsistent with and contrary to holdings of the Ninth and Eleventh Circuits and of United States District Courts in California and New Jersey; and (4) the Fourth Circuit's decision threatens to vitiate the statute and so deserves review and determination by the Supreme Court.

I. THE FOURTH CIRCUIT'S DECISION IS DIRECTLY CONTRARY TO ITS EARLIER DECISION IN DARDEN REGARDING THE MEANING OF "PLAN" UNDER ERISA.

As quoted above, ERISA requires that retirement benefits "vest" and become nonforfeitable once an employee has

maintained employment for a minimum length of time. ERISA Section 203(a), 29 U.S.C.A. Section 1053(a). This requirement applies to all "pension plans" under the statute, with "pension plan" being defined as "any plan, fund or program established or maintained by an employer." ERISA Section 3(2)(a), 29 U.S.C.A. Section 1002(2)(a). The only pension plans to which the vesting requirements do not apply are the specifically enumerated exceptions contained in ERISA Section 201, 29 U.S.C.A. Section 1051. If a benefits arrangement falls within this definition of "pension plan" and is not specifically excepted, then "bad-boy" clauses calling for forfeiture of benefits because of post-termination conduct of the employee are invalid. Winer v. Edison Brothers' Stores Pension Plan, 593 F.2d 307, 311 (8th Cir. 1979), Rehearing and Rehearing

En Banc denied (1979) (citing extensively from legislative history); Fremont v. McGraw Edison Co., 606 F.2d 752 (7th Cir. 1979).

The question is thus whether the Plaintiffs' arrangement is a "plan, fund or program" within the meaning of the statute. Some two months before ruling in the negative in the present case, the Fourth Circuit issued a decision in an identical factual situation in which it said that there was an ERISA plan. Darden, infra A-113. This decision in Darden is factually undistinguishable from the present case, so that the opposite results place the decisions unavoidably in conflict. As with the present case, Darden involved an insurance salesman whose employment contract contained a retirement plan; like here, there were no separate documents other than the employment

contract establishing the agent's right to receive the benefits. The benefits were also calculated in the same manner as here and were payable, like here, over a period of years after termination of employment, regardless of the reason for the termination.

It is remarkable to compare the factual circumstances in Darden with the factual circumstances here, because of their similarity. In the present case, the Fourth Circuit found it significant that the plan benefits were calculated on the basis of commissions earned over the last year of employment and were thus more like a "final commission" than a retirement benefit. A-13. Yet the benefits in the Darden plan were calculated exactly the same way. A-116-117. Similarly the Fourth Circuit in the present case emphasized that the benefits were payable regardless of the reason for

leaving the Company and not just because of retirement. A-13-14. Again, this was true of the Darden plan as well. A-118. The next section of this Petition, discussing the specific terms and purposes of ERISA, will suggest that Darden was in keeping with those terms and purposes and the present case was not, and that the Court should review this case for that reason. What is more significant for the moment is that ERISA is an important federal statute which governs private pension plan administration nationwide and affects millions of the nation's employees, and the Fourth Circuit has now issued conflicting decisions which cloud the meaning of that statute. The situation should be clarified by this Court.

II. THE FOURTH CIRCUIT'S DECISION DEPARTS FROM THE LANGUAGE AND MEANING OF ERISA.

At issue here is the reach and breadth of ERISA, which was intended by Congress as a comprehensive remedial statute. In enacting the statute Congress intended it as a broad-reaching law to rectify widespread problems with private pension plans. As noted in the legislative history, pension plans as of 1974 affected some 30 million people, or about half the nation's non-farm work force. 1974 U.S. Code Cong. and Adm. News 4641, 4678, 4839, 4899. Congress anticipated that by 1980, some 42 million people would be covered by private pension plans, and the expressed hope and intent was to encourage the development of private plans to cover all, or as nearly all as possible, of the nation's non-farm and non-public employees. 1974 U.S. Code Cong. and Adm. News 4647, 4676,

4678, 4709, 4840, 4890, 4900, 4924, 5032. While making these findings Congress noted that millions of people had been promised benefits during long years of work, only to lose the benefits because of overly restrictive forfeiture provisions or lack of vesting in the plans. ERISA Section 2(a), 29 U.S.C.A. Section 1001(a); 1974 U.S. Code Cong. and Adm. News 4679, 4719, 4720, 4890, 4891. Thus Congress enacted ERISA to govern these plans, to set minimum standards "assuring the equitable character of such plans and their financial soundness." ERISA Section 2(a), 29 U.S.C.A. Section 1001(a).

In keeping with these purposes, Congress wrote ERISA as an extremely comprehensive statute. Under its definitions, a pension plan includes "any plan, fund or program" which provides income after termination, regardless of

how the benefits are calculated or paid. ERISA Section 3(2)(A), 29 U.S.C. Section 1002(2)(A). All pension plans are subject to the vesting standards unless expressly exempted under ERISA Section 201, 29 U.S.C.A. Section 1051.

In the present case the Fourth Circuit has cited to a number of aspects of the Farm Bureau plan in hopes of removing it from this coverage, but none of the things it cites makes any difference under the statute. For example, the Fourth Circuit emphasizes that the plan calculates the benefits based on the last year's commissions, making them like a "final commission." A-13. But the statute, as noted, says that "the method of calculating the benefits under the plan" is irrelevant. ERISA Section 3(2)(A), 29 U.S.C.A. Section 1002(2)(A). The regulations promulgated by the Secretary to help define "pension

plans" consider the indicative factor not to be the method of calculating the benefits, but rather the length of the payment period. Under these regulations, a plan is not considered a pension plan if all payments are completed within 24 months after employment ends. 29 C.F.R. Section 2510.3-2(b)(iii)(B)[1979]. The Farm Bureau payment period, lasting either 5 or 10 years, depending on the contract, exceeds the limit and thus is a pension plan under the regulation.

Similarly, the Fourth Circuit in the present case considers the Farm Bureau plan to be a "buy-out", which is not factually correct nor, even if correct, would it be an exemption from ERISA. A-14. The only kinds of "buy-out" plans exempt under the statute are those to retired or deceased partners. ERISA Section 201 (5), 29 U.S.C. Section 1051(5); 1974 U.S. Code Cong. and Adm.

News 5043. By implication, this must mean that any other kind of buy-out arrangement involving payments by the employer to the employee must be covered.

Finally, the Fourth Circuit's concern that agents need not actually "retire" in order to be entitled to benefits is misplaced. The legislative history reveals a specific intent by Congress to make the vesting standards age-neutral, applying to young employees as well as old based on length of service, not on whether they leave the work force after termination of employment. 1974 U.S. Code Cong. and Adm. News 4709, 4710, 4924, 4931.

Factually, the present case is considerably more compelling than Darden in terms of there being a "plan" under ERISA. In Darden, the Plaintiff was proceeding individually, and there was no evidence - at least none noted by the

Fourth Circuit in its decision - as to the uniformity of his retirement provision throughout the agency force. In contrast, in the present case there was a great deal of evidence that the Plaintiffs' contracts, which were identical to each other, were identical in every way to the contracts of the remaining members of the Company's agency force. The evidence was that the plan had been established by the employer roughly 25 to 30 years before the suit was brought. During all that time the plan was established, managed and maintained in uniform, across-the-board policies by the Farm Bureau. There was no individual negotiation between individual agents in the Company; there was no authority even for the Company's sales division officers to alter the form language. There was equally conclusive evidence that the Farm Bureau and only

the Farm Bureau was the responsible party for making the payments and that the Farm Bureau and only the Farm Bureau determined whether any individual agent met the criteria for payment.

A noted commentator has considered this question whether identical form contracts used by an employer throughout the work force which promise retirement benefits constitute a plan under ERISA. The answer is that they do. Goodman and Stone, in "Exempt Compensation Arrangements Under ERISA," 28 Cath. U. L. Rev. 445, 453 (1979), reviewing the "individual contracts" exception on which the Fourth Circuit relies, said that

> it seems probable that the Department of Labor would consider a plan to exist once a discernible pattern of such contracts emerged and it became apparent that these were not individually negotiated contracts designed to meet specific aims.

To say that a "discernible pattern" exists for the Farm Bureau contracts is a major understatement. The Fourth Circuit has misread ERISA and improperly narrowed its scope, and this Court should review that determination. ERISA is an important statute which affects a great many people and it is important that the Supreme Court speak to its interpretation.

III. THE FOURTH CIRCUIT'S DECISION NARROWS THE DEFINITION OF "PLAN" UNDER ERISA IN A MANNER CONTRARY TO OTHER CIRCUITS.

The proper interpretation of ERISA, in light of its purposes and breadth, is that it includes a broad range of different kinds of arrangements. This is the approach taken by other Circuits, and is contrary to the Fourth Circuit's ruling. The major case on the subject is Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982)(en banc). Donovan

considered the prerequisites for a "plan" to exist under ERISA and held that a "custom" or a "pattern or practice" is enough to constitute a plan; there need not be a writing or specific formalization at all. As Donovan said,

> Commentators and courts define "plan, fund or program" by synonym - arrangement, scheme, unitary scheme, program of action, method of putting into effect an intention or proposal, design - but do not specify the prerequisites of a "plan, fund, or program." At a minimum, however, a "plan, fund or program" under ERISA implies the existence of intended benefits, intended beneficiaries, a source of financing, and a procedure to apply for and collect benefits. Id., 1372.

Donovan continues thereafter to note that:

> In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits. Some essentials of a plan, fund or program can be adopted, explicitly or implicitly, from sources outside the plan, fund

> or program... but no single act in itself necessarily constitutes the establishment of the plan, fund or program. Id., 1373.

The Ninth Circuit reached the same result in Scott v. Gulf Oil Corporation, 754 F.2d 1499, 1503-4 (9th Cir. 1985), holding that the only requirements for a plan to exist are that a reasonable person must be able to ascertain the intended benefits, the beneficiaries, source of financing, and procedures for receiving benefits. Scott, 754 F.2d at 1504. The Scott decision on this point was cited approvingly by the Fourth Circuit in Holland v. Burlington Industries, Inc., 772 F.2d 1140 (4th Cir. 1985). The Fourth Circuit in the present case did not make any reference to the Holland decision.

District court decisions in the last few years have followed these cases in holding that ERISA covers arrangements

between employers and employees established by custom or practice, regardless of what kind of formal documentation, if any, there may be. California Hospital Association v. Henning, 569 F.Supp. 1544, 1545-6 (C.D.Cal. 1983); Petrella v. N.L. Industries, Inc., 529 F.Supp. 1357, 1362 (D.N.J. 1982). Both of these cases involved employers who had created benefits programs through practice and custom without formal documentation. In both cases the courts found ERISA plans to exist.

The point about these cases is that the standards they create for ERISA require that the Farm Bureau benefits package here must considered a "plan, fund or program" under the statute. The evidence in the case is unambiguous that Farm Bureau management created this arrangement long ago and has maintained

it ever since on a uniform, company-wide basis for every insurance agent who has worked for them. There is absolutely no question but that this was a pattern, practice, course of conduct, arrangement, scheme, unitary scheme, program of action, method of putting into effect an intentional proposal, or design, as Donovan used those terms. There is likewise no question that the Farm Bureau promised these benefits to its workers upon long years of employment and that ERISA's protections should apply to prevent abuse of that promise.

In contrast to this weight of authority, both from these cases and from the broad statement of purpose in ERISA's legislative history, the authority relied upon by the Fourth Circuit to narrow ERISA and exclude the Plaintiffs is virtually nil. The Fourth Circuit cited one single district court case from

California and a number of aged, unpublished Department of Labor Opinion Letters, none of which have significant precedential value and none of which are factually applicable. All of them preceded the cases cited above. The case on which the Fourth Circuit relied, Jervis v. Elerding, 504 F.Supp. 606, 607-8 (C.D.Cal. 1980), involved an apartment complex manager who was promised by the owner that she could remain in her apartment after she retired as manager. The district court said that this was an individually negotiated arrangement not subject to ERISA. This is the same district that decided the California Hospital Association case three years later, so it is questionable how important Jervis is today even within the district that decided it. In any event, the difference between the purported "plan" in that case and the situation at

present, where every member of the 400-person agency force for the last 25 to 30 years has labored under the same company-created and company-administered arrangement, is obvious.

Once again, the Fourth Circuit decision is contrary to the decision of other Circuits under ERISA, and that conflict needs to be reviewed.

IV. REVIEW OF THE ISSUE BY THE SUPREME COURT IS IMPORTANT BECAUSE THE FOURTH CIRCUIT'S DECISION THREATENS TO VITIATE THE STATUTE.

It is finally notable that the Fourth Circuit's interpretation of ERISA threatens to vitiate the statute. All of the stated purposes of the Act - the main ones being to assure the financial soundness of plans and to protect workers with long years of service from overly harsh forfeitures - depend on the statute's being read broadly enough to cover all the loopholes that employers

may create. The Supreme Court has already addressed this problem with regard to another comprehensive remedial statute, the Social Security Act, and has said that

> As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of its phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation. U.S. v. Silk, 331 U.S. 704, 712, 67 S.Ct. 1463, 1467 (1947).

ERISA, like the Social Security Act, needs to have its coverage interpreted broadly in light of the scope of the problems it was meant to address. The Fourth Circuit has now held that an employer can escape ERISA's requirements simply by incorporating its pension documents wholesale into employment

contracts rather than have them stand as separate documents; and moreover, the employer can do this no matter how large its work force is and no matter how uniform its policies are. This is the kind of "adroit scheme" that ERISA was meant to prevent, and the Fourth Circuit's decision should be reviewed by this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted in all respects.

This the 16th day of January, 1987.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals was duly served upon the following by depositing same enclosed in a post paid, properly addressed envelope in a Post Office or official depository under the exclusive care and custody of the United States Postal Service:

Mr. Gregory B. Crampton
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This the 16th day of January, 1987.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-2076 (L)

R. E. FRAVER, et al,
Appellees,

versus

NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY,
Appellant,

No. 85-2077

R. E. FRAVER, et al.,
Plaintiffs,

and

J. RIVES MANNING, JR., et al.,
Appellants,

versus

NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (CA 83-129).

Argued: April 9, 1986

Decided: September 18, 1986

Before RUSSELL, SPROUSE, and CHAPMAN, Circuit Judges.

Gregory B. Crampton (W. Sidney Aldridge; Merriman, Nicholls, Crampton, Dombalis and Aldridge, P.A. on brief) for Appellant/cross-appellee; Charles R. Holton (David E. Fox; Bryan E. Lessley; Powe, Porter and Alphin, P.A. on brief) for Appellees/cross-appellants.

CHAPMAN, Circuit Judge:

Appellant North Carolina Farm Bureau Mutual Insurance Company ceased paying certain benefits to appellees, former members of its sales force, when they violated a condition of payment. Appellees filed this action, alleging that the condition was unenforceable under the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section

1001 et seq. (1982 & Supp. II 1984 (ERISA). The central issue is whether the court erred in ruling that the former agents had been employees of Farm Bureau for purposes of ERISA and that the benefits provisions of their contracts established employee pension benefit plans. Finding no pension plan within the meaning of ERISA, we reverse.

I

Farm Bureau markets its insurance through a sales force of agents and agency managers who solicit applications for insurance. Farm Bureau has treated the members of its sales force as independent contractors. They are paid through commissions, which are reported to the IRS on Form 1099, not Form W-2. Farm Bureau withholds neither FICA nor FUTA from the commissions. Farm Bureau has a funded pension plan that complies with ERISA for its full-time employees,

but the members of the sales force do not participate in that plan.

The contracts provide for termination at the end of the year that the agent or agency manager reaches age 65 or by either party upon ten days notice, without cause. The agent's contract contains the following provisions:

> RETIREMENT, DEATH AND DISABILITY BENEFITS
>
> 14. Upon termination of this contract, Company shall pay to agent . . . an amount equal to the agent's renewal commission for the last 12 months prior to termination of this contract. The following provisions shall apply to this payment:
>
> (A) Payment shall be made unless contract is terminated for reasons of fraud or criminal act.
>
> (B) Agent shall have been agent for Company for at least five consecutive years prior to termination of contract.
>
> (C) Amount payable shall be paid in 60 equal monthly payments beginning 60 days after termination of contract.
>
> (D) Agent shall not be licensed to sell any kind of insurance in North Carolina during the payment period.

. . .

> (G) Company shall deduct above payment from the commission payable to the incoming agent in equal monthly amounts for 60 consecutive months beginning the first full month after the Agent takes over the territory.

The agency manager's contract contains similar provisions. Farm Bureau has no fund or trust for the payment of these benefits.

Plaintiffs are former agents or agency managers for Farm Bureau who, during the payment period, became licensed to sell insurance with other companies in North Carolina and solicited sales in competition with Farm Bureau. When Farm Bureau discontinued payment of their benefits, they instituted this action in the U.S. District Court for the Eastern District of North Carolina. Plaintiffs alleged that they had been employees of Farm Bureau covered by ERISA and that the benefits provision of their contracts

established a pension plan under ERISA. They alleged that the condition under which Farm Bureau ceased making payments violated ERISA's vesting provisions, 29 U.S.C. Section 1053 (1982 & Supp. II 1984), and thus is invalid and unenforceable. They sought to recover sums past due and sought a declaratory judgment that the remaining amounts would become due in the future.

On the parties' motions for summary judgment, the court granted partial summary judgment for plaintiffs, ruling that the agents and agency managers had been employees of Farm Bureau covered by ERISA and that the termination benefits were pension plans under ERISA. The court found that the benefits were vested under the contract and that the clause requiring that the plaintiffs not be licensed to sell insurance during the payment period was invalid and

unenforceable because of ERISA's nonforfeitability requirements.

On Farm Bureau's motion to alter or amend the judgment, the court ruled that the five-year vesting period in the contract exceeded the requirements of Section 1053(a)(2)(A), that an employee with at least ten years of service has a nonforfeitable right to his entire accrued benefit derived from employer contributions. The court ruled that although the benefits were vested after five years, they were forfeitable under the condition until the agent had ten years of service; therefore, those plaintiffs with less than ten years of service were barred from recovery. Following trial on the issue of whether plaintiffs were covered by the highly-compensated employee exception to ERISA's vesting requirements, Section 1051(2), the court entered an order incorporating

its prior rulings and holding that plaintiffs were not covered by the exception. Farm Bureau appeals, and plaintiffs cross-appeal.

II

The parties have raised numerous issues, but we need address only one. Farm Bureau argues that even if plaintiffs were its employees under ERISA, the court erred in determining that the contractual provisions establishing the termination benefits constituted a pension plan within the meaning of ERISA. Given the specific facts here, we agree.[1]

The nonforfeitability requirements of ERISA, set forth in Section 1053(a), apply to pension plans, which are defined as follows:

---

1 Thus, we need not determine whether the district court erred in ruling, on a motion for summary judgment, that plaintiffs were employees of Farm Bureau.

> Except as provided in subparagraph (B) [regarding the Secretary's power to create certain exempt categories], the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. Section 1002(2)(A) (1982). The provisions do not establish any deferral of the agent's and agency manager's income. Thus, the question is whether they provide retirement income.

In two opinion letters prepared by the Office of Pension & Welfare Benefit

Programs, the Department of Labor has indicated that employment contracts that include provisions for post-retirement income are not themselves "plans" within the meaning of ERISA. The first letter dealt with a situation in which an employee entered into an agreement with his employer under which he would be paid a pension benefit upon his reaching age 65; however, he was terminated from his employment before any of his benefit was vested. The opinion letter states that the agreement "is an employment contract and is not an 'employee pension benefit plan' as that term is defined in the Act. . . . [T]he agreement is not subject to the requirements of . . . ERISA." U.S. Department of Labor Opinion Letter 76-79 (May 25, 1976). The second letter dealt with an agreement between a corporation and an employee/50-percent shareholder to provide him additional retirement

compensation for past services in return for certain consideration. the opinion letter states: "Under the circumstances, the agreement is an individual contract with Mr. (x) to render specific personal services and does not constitute an employee pension benefit plan within the contemplation of Section 3(2) of . . . ERISA." U.S. Department of Labor Opinion Letter 76-110 (Sept. 28, 1976).

It was primarily on this basis that the court held in Jervis v. Elerding, 504 F. Supp. 606 (C.D. Cal. 1980), that "a contract between an employer and individual employee providing for post-retirement or post-termination in-kind compensation is not a 'plan, fund, or program' within the definitional framework of ERISA." Id. at 608. That case involved an agreement between an apartment complex owner and his manager. The parties agreed that following the

termination of the manager's employment, the manager would receive an apartment and utility services at no cost to her for the same number of months each year as the number of years that the manager had worked for the owner. This apartment was to be provided regardless of the reason for termination, whether by retirement or mutual cancellation or even breach by either party. When the manager left her position and the owner refused to provide the apartment, the manager brought an action under ERISA. The court dismissed the ERISA claim finding that the parties simply entered into an employment contract and did not create an employee pension benefit plan.

We find a similar situation in this case. The entire thrust of the agent's and agency manager's agreements involved here was to establish the parameters of the relationship between Farm Bureau and

the agent or agency manager. The agreement appointed him to his position, stated his rights and duties, established the rate of his compensation, and discussed the term of the relationship. The post-termination benefits are calculated on the basis of the agent's commissions for the prior year and, in that respect, are like a final commission, paid over an extended term.

Further, the nature of the payments is not indicative of a pension or retirement plan. The provisions in question are entitled "Retirement, Death and Disability Benefits." Of course, the nature of the benefits cannot be determined from the title alone. The terms make it clear that the benefits were not limited to termination for death, disability, or retirement. The agent could terminate his contract at any age, and the payments were to be made

regardless of the reason for termination except when the agent was terminated for reasons of fraud or criminal act. The amount of the payment is tied to only one factor, the amount of business in the last year prior to termination. Finally, the payments are recouped from the individual's successor. In sum, the benefits are in the nature of a buy-out in which the departing agent receives payments based on what he leaves behind in the way of business for his successor. If the departing agent goes into competition with his successor, he is destroying the resource that would be used to pay him.

Under these specific circumstances, we find that the agreements were simply employment or agency contracts, that the terms in question simply established a final form of compensation for the business created by the agent, and that

these payments do not constitute retirement income. Therefore, we find that these benefits are not pension plans and do not come within the scope of ERISA. Accordingly, the judgment of the district court must be

REVERSED.

sh:C1245

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 83-129-CIV-5

R.E. FRAVER, ET AL., Plaintiffs,	)	
v.	)	ORDER
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, A Corporation, Defendant.	)	

Plaintiffs, former insurance agents or agency managers of defendant, instituted this action, invoking jurisdiction under 29 U.S.C. Section 1132(e)(i), seeking: (1) monetary recovery of "retirement" benefits owed to them by defendant; (2) a declaratory judgment determining (a) that such benefits will be due and owing to them by defendant in the future, and (b) that the contract terms requiring forfeiture of benefits by reason of competition are invalid and unenforceable

under the provisions of section 203 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1053. This matter is before the court on the parties' cross motions for summary judgment. The facts as set forth in this opinion are undisputed:

Defendant, The North Carolina Farm Bureau Mutual Insurance Company, is a mutual company (owned by its policyholders). It markets its insurance through persons, such as plaintiffs, who solicit applications for insurance. Such persons enter into an agency contract or an agency manager's agreement. Plaintiffs contend that their relationship to defendant was that of employees-employer. Defendant contends plaintiffs were independent contractors.

Each of the plaintiffs at various times entered into an individual "Agent's Contract" or "Agency Manager's Agreement"

with defendant, said agreements authorizing each plaintiff to solicit applications for insurance pursuant to the terms thereof. All agreements were terminable by either party upon ten days notice to the other.

Each Agent's Contract contains a standard provisions reading as follows:

> "RETIREMENT, DEATH AND DISABILITY BENEFITS"
>
> 14. Upon termination of this contract, Company shall pay to agent, or his surviving spouse, if any, otherwise to his estate, an amount equal to the agent's renewal commission for the last 12 months prior to termination of this contract, The following provisions shall apply to this payment:
>
> (A) Payment shall be made unless contract is terminated for reasons of fraud or criminal act.
>
> (B) Agent shall have been agent for Company for at least five consecutive years prior to termination of contract.
>
> (C) Amount payable shall be paid in 60 equal monthly payments beginning 60 days after termination of the contract.
>
> (D) Agent shall not be licensed to

sell any kind of insurance in North Carolina during the payment period.

(E) Any indebtedness on the part of the agent to the Company shall be deducted before the monthly payments are calculated.

(F) Monthly payments shall be made only if the benefits amount to $10.00 per month or more. Otherwise the entire amount shall be paid in a lump sum.

(G) Company shall deduct above payment from the commission payable to the incoming agent in equal monthly amounts for 60 consecutive months beginning the first full month after the Agent takes over the territory." (Emphasis added).

Each Agency Manager's Agreement contains a standard provision reading as follows:

"RETIREMENT, DEATH AND DISABILITY BENEFITS

15. Upon termination of this contract, Company shall pay to Agency Manager, or his surviving spouse, if any; otherwise, to his estate or his lawful heirs or beneficiaries, an amount equal to a percentage of the written premium (excluding Risks assigned to Company) in his county for the last calendar year prior to termination as follows:...

The following provisions shall apply to this payment:

(A) Payment shall be made unless contract is terminated for reasons of fraud or criminal act.

(B) Amount payable shall be paid in 120 equal monthly payments beginning 60 days after termination of contract.

(C) In order to be eligible to receive any of the benefits provided herein, Agency Manager shall not be licensed to sell nor shall be sell any kind of insurance in North Carolina at any time during the payment period set forth above. If any Agency Manager violates this provision, no further payment shall be made by the Company, and Agency Manager shall reimburse Company for any payments made because of not being informed, after the date of violation by the Agency Manager.

(D) Any indebtedness on the part of the Agency Manager to Company shall be deducted before payments are calculated.

(E) Company shall deduct above payments from the commission payable to the incoming Agency Manager in equal monthly amounts for 120 consecutive months beginning the first full month after the Agency Manager takes over the territory.

(F) If Agency Manager was promoted from position of Agent for this Company, his time of continuous service during the first five years

> as Agency Manager shall accrue to his time of continuous service as Agency toward qualification for Agents retirement. After five years consecutive service as Agency Manager, the Retirement, Death and Disability Benefits set forth above, shall be applicable in lieu of those which are applicable to Agents. (Emphasis added).

Each plaintiff, after termination of his respective contract, and in violation of paragraph 14(D) of the Agent's Contract or paragraph 15(C) of the Agency Manager's Agreement, was licensed to sell insurance in North Carolina during the applicable payment period.

The case of Hudson v. North Carolina Farm Bureau Mutual Insurance Company, 23 N.C. App. 501, 209 S.E.2d 416 (1974), cert. denied, 286 N.C. 414, 211 S.E.2d 802 (1975) held that the condition precedent-forfeiture clause relating to not being licensed to sell insurance in North Carolina during the payment period was a constitutional, valid and binding

agreement and that a former agency manager of defendant was not entitled to such payments if he violated the contract section.

The payments provided for in the Agent's Contract and in the Agency Manager's Agreement pursuant to paragraphs 14 and 15 respectively, are treated as commission payments to the former agent-agency manager. No separate fund is set up or maintained by defendant for such payments. Payments to former agents are reported to the Internal Revenue Service on Form 1099 as commission earned, and are reported in the same manner as commissions earned by active agents are reported to the Internal Revenue Service.

The amounts paid to former agents or agency managers are deducted from the commissions payable to the incoming agent or agency manager who replaces the

outgoing agent or agency manager and are reflected on the defendant's books as a credit to the outgoing agent and a debit to the commissions of the incoming agent. There is no additional expenditure of funds by defendant to accomplish said payments.

The defendant presently has in effect a funded pension plan covering all of its full time employees (those working more than 1,000 hours during the calendar year, who are more than 24 1/2 years old, who have been employees of the defendant for more than six months, and who meet said eligibility requirements before the age of 63). Such plan is provided by Southern Farm Bureau Life Insurance Company, pursuant to a deposit administration contract with the defendant. Said plan was revised effective January 1, 1976, in compliance with the requirements of ERISA. The

defendant files an annual audit of said pension plan pursuant to the requirements of ERISA each year with the Pension Plan Guaranty Corporation, and has received a favorable determination letter from the Internal Revenue Service in connection with said plan by letter dated March 11, 1981. Agents and agency managers are not included and do not participate in the defendant's qualified pension plan.

With regard to the payments under consideration, it is noted that:

1. Notwithstanding the caption "Retirement, Death and Disability Benefits," such payments are triggered by termination of the contract for <u>any</u> reason, including but not limited to retirement, disability, death, change in vocation, location, marital status, family obligations, etc. Termination for <u>any</u> reason is a predicate for such payments.

2. Agents' payments are predicated on five years of continuous service as an agent or as agent and agency manager combined. Agency managers' payments are predicated on five years' continuous service.

3. An agent or agency manager may terminate his contract at any age.

4. The total payment amount for an agent is predicated on his performance as reflected by the renewal commissions during the 12 months prior to his termination. The total payment amount for an agency manager is predicated on his performance as reflected by written premiums for the last calendar year prior to termination. In each case the sum is not related to the payee's age or length of service per se, nor is there any standard amount payable, the amounts varying from individual to individual. The amount to be paid to any single

individual would also vary, up or down, from year to year.

ERISA Coverage of Defendants' Retirement Benefits

Employers frequently provide additional compensation to employees upon their separation from employment by means of a formal program or informal practice. Generally, such compensation is provided without regard to the reason for termination. The amount of severance compensation is typically based upon the rate of pay to the employee prior to termination and the length of service of the employee.

The defendant's plan is such a severance pay plan. It is a formal plan, in that each agent's contract or agency manager's agreement contains the identical language governing severance pay. The amount of severance compensation is based upon that portion

of the agent's pay derived from renewal commissions or written premiums prior to termination, and the payments are predicated upon length of service.

All agent's contracts or agency manager's agreements respectively indicate that the defendant will recoup the payment from the renewal commissions of the incoming agent or agency manager. The latter, however, are not parties to the contract or agreement, and are not legally or contractually obligated to a terminating outgoing agent/agency manager. Hence if an agent terminates his association with the defendant, he can look only to the defendant's general assets for payments. In this respect, the plan is unfunded, i.e., there is no res separate from the ordinary assets of the corporation. Belka v. Rowe Furniture Corp., 571 F. Supp. 1249 (1983) at page 1250.

In February of 1979, the Department of Labor issued a final regulation setting forth the circumstances under which a severance pay plan will not be considered an employee pension benefit plan. 29 C.F.R. Section 2510.3-2(b) et seq. The regulation states that a plan providing severance benefits on account of the termination of an employee's service will not be considered an employee pension benefit plan if (1) the benefits are not contingent, directly or indirectly, upon the employee's retiring; (2) the total amount of severed benefits does not exceed the equivalent of twice the employee's annual compensation for the year immediately preceding termination; and (3) all such payments to any employee are completed within 24 months after the termination of the employee's service.

It is manifest that all severance payments to outgoing agents and agency

managers are not completed within twenty-four months after termination of the agent's or agency manager's service. The exemption not having been met, the defendant's severance pay plan must be considered as a pension benefit plan subject to ERISA if the relationship between defendant and agents/agency managers is that of employer-employee. That is to say, the exemption of a specific type of severance pay plan from the requirement of ERISA necessarily implies other types of severance pay plans are covered by ERISA's requirements.

The Employer-Employee Issue

The next issue in determining whether the benefit plans in the agent contracts and agency manager's agreements violate ERISA is the determination of whether plaintiffs were employees of the defendant so as to be covered by that

act, for "A plan that includes only independent contractors and provides no benefits to employees is not covered by the Act." U.S. Department of Labor Letter 75-40 (April 17, 1975).

The approach to this issue is well charted in the following portion of plaintiffs' brief.

> ERISA defines "employee" simply as "any individual employed by an employer." ERISA Section 3(6), 29 U.S.C.A. Section 1002(6). ERISA provides no further specific guidance as to the meaning of "employee." In light of this statutory omission, there is no definitive authority as to the meaning of "employee" under ERISA. The Seventh Circuit applied a state common law test to ERISA in Wardle v. Central States, etc., Pension Fund, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112, 101 S. Ct. 922 (1981). In another jurisdiction, Cohen v. Martin's, 537 F.Supp. 766 (S.D.N.Y. 1982) attempted to fashion a test specific to ERISA based on cases interpreting other federal statutes as well as on the perceived purposes of ERISA.
>
> Credence to the attempt in Cohen is lent by U.S. v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468 (1947), which construed the meaning of the term "employee" under the

Social Security Act to be "a federal problem to be construed in light of the mischief to be corrected and the end to be obtained." Silk rejected the Restatement of Agency test for "employees" versus "independent contractors" and substituted a federal test which looked in part to the purposes to be served by the federal statute in question.

Even a brief perusal of Silk and of the common law reveals that the two sources look at nearly identical factors in determining employment status. The common law test for employee/independent contractor questions states as its key issue the amount of control which the employer has over the worker and, in particular, whether the employer has the right to control the worker with respect to the manner in which the work is performed as opposed to the right merely to require a particular result. Continental Bus System, Inc. V. N.L.R.B., 325 F.2d 267, 271 (10th Cir. 1963) (stating federal common law rule under a federal statute); Restatement of Agency, Section 220; Scott v. Waccamaw Lumber Co., 232 N.C. 162 (1950). Under common law, no single factor is considered controlling, but many factors are reviewed to determine the true nature of the relationship. The right to hire or fire assistants and associates without approval of the employer is one factor. The provision by the employer of or investment by the employee in office space, facilities, tools, and equipment is another factor. Method

of payment, power of either party to determine the hours of work, duration or permanence of the relationship, and degree of skill required, are yet more factors which are frequently considered.

These same factors are spelled out as important in Silk and under other similar cases interpreting employee/independent contractor disputes under federal statutes. Silk, as does common law, finds that "the industry's right to control how work shall be done is a factor" to be considered. Silk, 331 U.S. at 714, 67 S.Ct. at 1468-9; Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1311 (5th Cir. 1976) (defining "employee" under the Fair Labor Standards Act). Other factors include opportunities for profit or loss, investment in facilities, permanency of the relation, and skill required. Silk, 331 U.S. at 714. Under Silk, as at common law, with regard to these factors, "(n)o one is controlling nor is the list complete." Id.

Factors considered expressly by the Supreme Court in Silk include the degree to which the persons providing the services were integrated into the employer's business, the right of the persons providing the services to employ assistants, and the ownership of the facilities, among other things. Silk, 331 U.S. at 716-718, 67 S.Ct. at 1469-70. Finally, both Silk and the common law provide that the name given to the relationship by the parties is not determinative, but

rather the substance of the relationship controls. Silk, 331 U.S. at 715, 67 S.Ct. at 1469; Wardle v. Central States Pension Fund, 627 F.2d at 825.

The key to the difference between Silk and the common law lies in the reasons why Silk initially rejected the common law test. Silk relied heavily on the Supreme Court's earlier decision in N.L.R.B. v. Hearst, 322 U.S. 111, 64 S.Ct. 851 (1944), which had held that the technical common law tests for "employees" for vicarious liability purposes were not relevant to the National Labor Relations Act which was designated to remedy unequal bargaining power in wage, hour, and working condition controversies. Silk, 331 U.S. at 713, 67 S.Ct. at 1468; N.L.R.B. v. Hearst, 322 U.S. at 120-130, 64 S.Ct. at 855-860. As a result, Hearst adopted a more inclusive reading of the word "employee" than at common law in order to address the problems of all unequal bargaining power situations, not just the ones where formal common-law employer/employee situations existed.

Similarly in Silk, the Supreme Court adopted a definition of "employee" under the Social Security Act which included more workers than would fall under the common law definition. The Court said:

> As the federal security legislation is an attack on recognized evils in our

> national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

U.S. v. Silk, 331 U.S. at 712, 67 S.Ct. at 1467; Usery v. Pilgrim, 527 F.2d at 1308 (adopting a broad definition of "employee" under the Fair Labor Standards Act). Applying its new statutory standard to the case before it, the Supreme Court reversed two lower court decisions which had found the workers to be independent contractors under the common law tests and held them to be employees for purposes of the Social Security Act. Silk, 331 U.S. at 716-718, 67 S.Ct. at 1470, 1471.

This same kind of expansive reading of the term "employee" applies under ERISA as well as under Silk and Hearst. A constrictive reading would, as Silk feared, allow Farm Bureau and other employers to devise "adroit schemes" to avoid the purposes of the Act and would result in a continuance of the same problems which the Act attempts to address. Everything about ERISA indicates that the Act was passed to prevent abuse by companies and employers of retirement and other

benefits plans established for the benefit of people who worked for them. Congress' specific finding in enacting ERISA, as noted above, was that "employees with long years of employment are losing anticipated retirement benefits due to lack of vesting provisions". One purpose of ERISA was, again as noted, to protect such people from loss of their benefits. ERISA, 29 U.S.C.A. Section 1001(a) and (c). Congress found that pension plans directly affect the well-being of "millions of employees and their dependents" and are "affected with a national public interest." ERISA, 29 U.S.C.A. Section 1001(a) (1975). For the purpose of protecting workers in employment situations from the kinds of abuse noted by Congress, it is unimportant whether the workers in question meet common law definitions. Rather, it is important whether they have provided years of service for which they have been promised retirement benefits....

....

Everything about ERISA speaks of its complexity and comprehensiveness in addressing a severe national problem. If the test of "employee" versus "independent contractor," which is the test of the Act's coverage, is to deviate from the common law definitions, then it must do so in the direction of more comprehensive coverage, bringing under the act an even greater number of people to whom retirement benefits have been promised than would be included under common law agency tests.

In arguing that plaintiffs were independent contractors, defendant contends that payments to former agents (being debited to the commissions of incoming agents) are in reality a buyout provision in recognition of the business put on the books by the outgoing agent that will benefit the incoming agent, and in that sense, approximate a "sale" of the outgoing agent's business to the incoming agent. This argument is without merit as it relates to the status of plaintiffs. There is no agreement between the outgoing and incoming agent. Rather, it would appear to be a burden imposed upon the incoming agent by the defendant, which, in turn, indicates the dominance of the defendant in its dealing with agents and agency managers, and its extensive control over the parties. The court finds this argument, in fact,

supports the conclusion that the defendant and the agents have an employer-employee relationship.

Defendant also points to the following as indicative of plaintiffs' status as independent contractors:

1. The existence of the defendant's qualified pension plan covering employees other than agents and agency managers.

2. Agents and agency managers were advised that they were considered to be treated as independent contractors by defendant.

3. Agents and agency managers were paid on a commission basis, with all commission payments made by the defendant being reported to the Internal Revenue Service on Form 1099 as commissions earned.

4. Defendant never issued W-2 forms to such agents and agency managers, and no FICA or FUTA taxes were withheld or paid

by the insurance company on behalf of said agents or agency managers.

5. Agents and agency managers were not required to work any set hours by defendant and were in control of and independently responsible for their own schedules, appointments, and vacation times.

6. Plaintiffs retained as their proprietary interest file cards of their customers and contacts made while agents/agency managers of the insurance company even after termination of their licensing agreement with the defendant, and in fact, after termination of their contracts, certain plaintiffs solicited their old defendant's customers and contracts in their new business.

7. Certain plaintiffs maintained separate accounts in their own names to make cash deposits of money paid for premiums, and would in turn write checks

on these accounts to the defendant for premiums due.

8. Many of the plaintiffs maintained an office in their home and deducted those expenses on their tax returns.

9. Plaintiffs filed tax returns with the Internal Revenue Service indicating they were self-employed.

10. Plaintiffs paid for their own postage, long distance calls, supplies, travel and entertainment expenses.

11. The defendant did not provide at its expense any health or life insurance to such agents/agency managers.

12. A number of plaintiffs had in force Individual Retirement Accounts or HR-10 plans during the same period in which they were licensed with defendant, and during the same time when applicable law did not allow such individual plans to be maintained unless plaintiffs had self-employment status.

While relevant, the court does not find the foregoing determinative in view of the totality of the circumstances. In reality, the totality of the circumstances indicates that the defendant, in fact, because of its dominant position, exercised control over plaintiffs' means of performance. The defendant furnished each plaintiff a document entitled "Manual of Instruction or Memorandum of Understanding between North Carolina Farm Bureau Federation and (name of county) County Farm Bureau" (hereinafter referred to as

"Memorandum).[1] Agents either substantially conformed to the "suggestions" contained in the Memorandum or were terminated. The Memorandum gave detailed "suggestions" to agents regarding the performance of their duties, which, in fact, amounted to defendant's control over the same.

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[1] The Memorandum suggests that an agent "should" call at the office each day, and while there, should check the mail, give direction to the secretary, dictate letters, make phone calls, and leave a tentative plan for the day's activities. It requires the agent to "cooperate" with the defendant in furnishing written reports, attending meetings, and assisting in membership drives. It instructs the agent as to how to interact with the secretaries and staff. Additionally, the defendant controls the secretaries and the agents work must conform to the defendant's instructions to the secretary regarding the preparation of transmittal sheets, prospect files, cash sheets, billing notice, etc. Through control of the staff, the defendant indirectly controlled the agent.

The fact of control arose from the economic disparity between the defendant and plaintiffs. That dominance is evidenced by the following facts:

1. Plaintiffs had almost no personal investment in their business. Defendant provided their offices, their furniture, their secretaries, all their insurance forms and applications, and their phone service. All of these things remained Farm Bureau property at all times. In essence, the defendant controlled the tools utilized by the plaintiffs in the performance of their occupation. Plaintiffs used their personal cars, but such use does not necessarily indicate independent contractor status.

2. Essentially, plaintiffs testified as to having no knowledge of the insurance business before their association with the defendant. Their skill and knowledge was acquired solely through training

provided by defendant and through their performance of defendant's business. Defendant held regular training meetings at which attendance by the agency force was required, and the defendant provided quite an assortment of training and rate manuals and general guidelines.

3. Plaintiffs' dependency upon defendant's training, etc., and reliance thereon, is fully evidenced by the fact that through supplemental pay arrangements, defendant took care of new agents by paying salaries for the first few months and multiple commissions for the first few years of employment. This factor not only demonstrates the reliance by plaintiffs upon defendant for guidance, but also diminished the risk of profit and loss which normally would be associated by an independent contractor.

4. Plaintiffs were only permitted to sell insurance for the defendant, for

Southern Farm Bureau Life Insurance Company, and for North Carolina Blue Cross and Blue Shield under plans approved by County Boards. Plaintiffs were expected to work full time on such sales. Plaintiffs were required to account and report directly and promptly to defendant for all collection and policy applications, and defendant had the power to reject any applications. In short, the plaintiffs worked full time for a single employer with no independent use of skills.

5. Defendant had the power by contract to unilaterally establish territories in which plaintiffs could solicit clients, and defendant could change those territories at any time on its accord. Defendant could and did unilaterally take insurance sold by one agent away from that agent and "code" it to another agent who would collect commissions on it.

In essence, the defendant's dominance clearly required plaintiffs to either shape up or be shipped out.

Additionally, the court finds other factors persuasive in determining that plaintiffs were in fact employees of defendant. For example, advertising expenses were often shared between defendant and plaintiffs; each agent or agency manager was required to attend all meetings called by defendant, etc. In summation, while it is true that both plaintiffs and defendant took positions inconsistent with the employer-employee relationship, the reality of the situation was such that the plaintiffs were subject to the control of the defendant and in the last analysis, the defendant instructed and directed them in the performance of their duties.

Conclusion

The provisions of ERISA require vesting of retirement benefits, such requirements being intended to protect long-time employees from losing retirement benefits due to lack of vesting provisions. See 29 U.S.C.A. Section 1001(a) and (c). ERISA also prohibits employee pension benefit plans from including clauses which deny employees their benefits if they compete with their former employer after termination. See Winer v. Edison Brothers Stores Pension Plan, 593 F.2d 307, 311 (8th Cir. 1979).

ERISA sets out three different kind of minimum vesting schedules, giving employers some flexibility in establishing or maintaining plans while at the same time protecting employees from the harsh results associated with pre-ERISA plans. The defendant's plan (the standard agent contract and agency

manager's agreement) vests the retirement benefits provided therein in the employee at the conclusion of five years' continuous service, subject to divesture or forfeiture by reason of competition (i.e. being licensed to sell insurance in North Carolina). It is the court's view that the defendant's plan exceeds the minimum vesting requirements, as indicated above.[2] As heretofore

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2 The first vesting requirement (29 U.S.C. Section 1053(a)(2)(A), is known as "cliff vesting" and requires that at the end of ten years an employee must have a non-forfeitable right to 100% of his or her accrued benefits from employer contributions. The second minimum schedule, called "graded vesting" provides for a non-forfeitable interest of 25% at the end of five years of employment, with non-forfeitable percentages increasing each year until 100% is reached at the end of five (sic-should say fifteen) years. 29 U.S.C.A. Section 1053(a)(2)(B) The third plan is a combined formula of employee age plus years of service. 29 U.S.C.A. Section 1053(a)(2)(C). Plaintiffs' rights are vested, not under res, but in an obligation owed to them by the defendant at the end of five years of continuous service.

indicated, post-employment conduct of the employee cannot cause forfeiture of vested retirement benefits. See Winer v. Edison Brothers' Stores Pension Plan, 593 F.2d 307; Freemont v. McGraw Edison Company, 606 F.2d 752 (7th Cir. 1979). It is this court's view, therefore, that the non-competition provision contained in the agent's contract and agency manager's agreement is invalid under ERISA to the extent that it allowed for forfeiture of payments to which plaintiffs would otherwise be entitled. For the foregoing reasons, plaintiffs' motion for summary judgment is ALLOWED, and it is now, therefore, ORDERED, ADJUDGED AND DECREED that:

1. Defendant's motion for summary judgment is DENIED.

2. Plaintiffs' motion for summary judgment is ALLOWED.

3. Plaintiffs have and recover damages for retirement benefits past due and wrongfully withheld by defendant and that the defendant shall render an accounting to plaintiffs setting forth the exact sums due the individual plaintiffs at the time this judgment is entered.

4. Plaintiffs are entitled to a recovery from defendant of retirement benefits which will become due and payable in the future and defendant shall render an accounting to plaintiffs setting forth the sums which will actually become due and payable in the future.

5. Paragraph 14(D) of the standard agent contract (as set forth herein) and Paragraph 15(C) of the standard agency manager agreement (as herein set forth) are declared to be invalid and unenforceable under the provisions of ERISA and more particularly Section 203

of that act which prohibits forfeitures, 29 U.S.C. Section 1053.

6. Attorney's fees shall be awarded to plaintiff pursuant to 29 U.S.C. Section 1132(g), and plaintiffs and said attorneys are herewith directed to file a motion for the allowance of such attorney's fees and supporting information in regard thereto.

7. The costs of this action and interest shall be taxed to the defendant.

SO ORDERED.

This 22nd day of June, 1984.

/s/ James C. Fox
JAMES C. FOX
United States District Judge

ls:D1934

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

R. E. FRAVER, et al. Plaintiffs,	)	No. 83-129-CIV-5
v.	)	ORDER AND JUDGMENT
NORTH CAROLINA FARM BUREAU INSURANCE COMPANY, A CORPORATION, Defendant.	)	

INTRODUCTION

Plaintiffs in this action are all former agents or agency managers of the defendant North Carolina Farm Bureau Mutual Insurance Company (hereinafter Farm Bureau). The employment contracts between all of the plaintiffs and the defendant contained provisions for income after retirement and all of the plaintiffs have been denied this income since leaving their employment with the company. The agency manager's retirement provisions were all identical with each

other and were substantially identical with the retirement provisions for agents, except for minor differences in the basis of calculating the amount of retirement income and the period over which such income would be paid.

The Court has already determined that all of the plaintiffs were "employees" of the defendant and that the retirement provisions in their contracts constitute a retirement "plan" under the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 et seq. (hereinafter ERISA). In particular, Section 1053 of ERISA, as this Court has heretofore ruled, requires that the Farm Bureau must pay the retirement benefits to those plaintiffs whose employment by the Farm Bureau was of sufficient duration to meet statutory vesting requirements and who are not otherwise excluded from the statute's protection.

The Court has already ruled on the issue of vesting requirements. The remaining issues for trial were threefold, to-wit:

1. whether the agents and agency manager's contracts constitute a single unfunded employee benefit plan maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees so as to exclude such employees, pursuant to 29 U.S.C. Section 1051(b), from the protection otherwise afforded them under ERISA;

2. whether the applicable statute of limitations expired against plaintiff, William A. Pleasant, so as to preclude his recovery; and

3. did plaintiff, Robert Dobbins, have ten years of service so as to give him a vested interest in the retirement plan?

This matter having been heard before

the court on June 3, 1985, and July 3, 1985, and the Court having heard the testimony of witnesses, having reviewed the exhibits admitted herein, and having heard the arguments of counsel, and counsel having stipulated as to certain facts, the Court herewith makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, C. B. Weatherly, Jr., is a citizen and resident of Durham County, North Carolina and at the time that he became disassociated with defendant he was performing services for defendant pursuant to an "Agent's Contract."

2. Plaintiff, R. E. Fraver, is a citizen and resident of Iredell County, North Carolina, and at the time that he became disassociated with defendant he was performing services for defendant

pursuant to an "Agency Manager's Agreement."

3. Plaintiff, J. Rives Manning, Jr., is a citizen and resident of Halifax County, North Carolina, and at the time that he became disassociated with defendant, he was performing services for defendant pursuant to an "Agent's Contract."

4. Plaintiff, J. C. Faust, is a citizen and resident of Buncombe County, North Carolina, and at the time that he became disassociated with defendant he was performing services for defendant pursuant to an "Agent's Contract."

5. Plaintiff, Hubert Hampton Martin, is a citizen and resident of Anson County, North Carolina, and at the time that he became disassociated with defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

6. Plaintiff, William A. Pleasant, is a citizen and resident of Caswell County, North Carolina, and at the time that he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

7. Plaintiffs, Lee Williams and Jimmy McElreath, are citizens and residents of Moore County, North Carolina. At the time that Plaintiff McElreath became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement." At the time that plaintiff Williams became disassociated from defendant he was performing services for defendant pursuant to an "Agent's Contract."

8. Plaintiff, Mike Steiner, is a citizen and resident of Cabarrus County, North Carolina, and at the time that he

became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

9. Plaintiffs, David Marion and James K. Wright, are citizens and residents of Randolph County, North Carolina. At the time that plaintiff Marion became disassociated from defendant he was performing services for defendant pursuant to an "Agent's Contract." At the time that plaintiff Wright became disassociated from defendant he was performing services for defendant pursuant to an "Agent's Contract."

10. Plaintiff, William A. Davenport, Jr., is a citizen and resident of Greene County, North Carolina, and at the time that he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

11. Plaintiff, Max K. Roberts, is a citizen and resident of Caldwell County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

12. Plaintiff, Ted Bright, is a citizen and resident of McDowell County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

13. Plaintiff, Billy Ray Staley, is a citizen and resident of Guilford County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

14. Plaintiff, William Samuel Kirby,

is a citizen and resident of Brunswick County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agent's Contract."

15. Plaintiff, Herbert M. Speas, Jr., is a citizen and resident of Burke County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agent's Contract."

16. Plaintiff, Robert L. Dobbins, is a citizen and resident of Richmond County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

17. Plaintiff, Linda G. Hamrick, is a citizen and resident of Cleveland County, North Carolina, and at the time she became disassociated form defendant she

was performing services for defendant pursuant to an "Agent's Contract."

18. Plaintiff, Edward L. Lowder, is a citizen and resident of Stanley County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agent's Contract."

19. Plaintiff, Ron Worthington, is a citizen and resident of Davidson County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

20. Plaintiff, David Breeden, is a citizen and resident of Robeson County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

21. Plaintiffs, Peggy Horney and Harry Horney, are citizens and residents of Avery County, North Carolina. At the time the plaintiff Peggy Horney became disassociated from defendant she was performing services for defendant pursuant to an "Agent's Contract." At the time that the plaintiff Harry Horney became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

22. Plaintiff, Robert J. Womble, is a citizen and resident of Harnett County, North Carolina, and at the time he became disassociated from defendant he was performing services for defendant pursuant to an "Agency Manager's Agreement."

23. Defendant is a corporation organized and existing under the laws of the State of North Carolina with its

principal office being located in the city of Raleigh, Wake County, North Carolina.

24. Defendant and the plaintiffs entered into certain written agreements.

25. Pursuant to these agreements, each plaintiff was designated as an agent or agency manager for defendant by the terms of his contract which was in effect at any particular time of his association with defendant.

26. The agreements entered into by those individuals who acted as agency managers for defendant contained certain provisions designated "Retirement, Death and Disability Benefits," the pertinent provisions of which are set forth below.

RETIREMENT, DEATH AND DISABILITY BENEFITS.

15. Upon termination of this contract, Company shall pay to Agency Manger, or his surviving spouse, if any; otherwise to his estate or his lawful heirs or beneficiaries, an amount equal to a percentage of the written

premium (excluding Risks assigned to Company) in his county for the last calendar year prior to termination as follows:

. . . .

The following provisions shall apply to this payment:

(A) Payment shall be made unless contract is terminated for reasons of fraud or criminal act.

(B) Amount payable shall be paid in 120 equal payments beginning sixty (60) days after termination of contract.

(C) In order to be eligible to receive any of the benefits provided herein, Agency Manager shall not be licensed to sell nor shall he sell any kind of insurance in North Carolina at any time during the payment period set forth above. If any Agency Manager violates this provision, no further payments shall be made by the Company, and Agency Manager shall reimburse Company for any payments made because of not being informed, after the date of violation by the Agency Manager.

(D) Any indebtedness on the part of the Agency Manager to Company shall be deducted before payments are calculated.

(E) Company shall deduct above payments from the commission payable to the incoming Agency Manager in equal monthly amounts

for 120 consecutive months beginning the first full month after the Agency Manager takes over the territory.

(F) If Agency Manager was promoted from position of the agent for this Company, his time of continuous service during the first five years as Agency Manager shall accrue to his time of continuous service as agent toward qualification for agent's retirement. After five years' consecutive service as Agency Manager, the Retirement, Death and Disability Benefits set forth above shall be applicable in lieu of those which are applicable to agents.

27. The agreements entered into by those individuals who acted as agents for defendant contained certain provisions designated "Retirement, Death and Disability Benefits." The pertinent provisions of those Benefits were set out in two separate forms, the first of which is set forth below:

RETIREMENT, DEATH AND DISABILITY BENEFITS.

14. Upon termination of this contract, Company shall pay to agent, or his surviving spouse,

if any, otherwise to his estate, an amount equal to the agent's renewal commission for the last twelve months prior to termination of this contract. The following provisions shall apply to this payment:

(A) Payment shall be made unless contract is terminated for reasons of fraud or criminal act.

(B) Agent shall have been agent for company for at least five consecutive years prior to termination of contract.

(C) Amount payable shall be paid in sixty (60) equal monthly payments beginning sixty (60) days after termination of contract.

(D) Agent shall not be licensed to sell any kind of insurance in North Carolina during the payment period.

(E) Any indebtedness on the part of the agent to the company shall be deducted from the monthly payments as calculated.

(F) Monthly payments shall be made only if the benefits amount to $10.00 per month or more. Otherwise the entire amount shall be paid in a lump sum.

(G) Company shall deduct above payment from the commission

payable to the incoming agent in equal monthly amounts for sixty (60) consecutive months beginning the first full month after the agent takes over the territory.

All of the Plaintiffs who were designated as agents, except plaintiffs J. Rives Manning, Jr. and J. C. Faust, had the above language incorporated into their "Agent's Contracts." Plaintiffs Manning and Faust had the following language incorporated into their "Agent's Contracts":

Upon termination of this Contract, Company shall pay commissions to Agent, or Agent's surviving spouse, if any, otherwise to Agent's estate, subject to the following provisions:

(a) Agent must have been an agent for Company for at least five (5) consecutive years prior to termination of this Contract.

(b) Agent shall receive an amount equal to a percentage of the premiums written by Agent for the last calendar year prior to termination as follows:

Length of Continuous Service as Agent	Percentage Written Premium to be Paid
Less than 5 years	0.0%
At least 5 but less than 6 years	2.5%
At least 6 but less than 7 years	3.0%
At least 7 but less than 8 years	3.5%
At least 8 but less than 9 years	4.0%
At least 9 but less than 10 years	4.5%
At least 10 years	5.0%

(c) The amount owing less any indebtedness of Agent to Company, hereunder shall be payable in one hundred twenty (120) equal monthly payments beginning sixty (60) days after termination of this Contract.

(d) Agent shall not sell any kind of insurance in North Carolina ,at any time, during the payment period set forth above without the prior written consent of Company. If Agent violates this provision, no further payments shall be owing to Agent by Company and Agent shall reimburse Company for any payments made after the date of such violation.

(e) Monthly payments shall be made only if the benefits amount to Ten Dollars ($10.00) per month or more; otherwise, the entire amount shall be paid in a lump sum.

(f) An amount equal to the amount paid monthly to Agent shall be

deducted monthly from the commissions payable to the agent who assumes Agent's territory.

(g) Contract was not terminated for any of the reasons set forth in Paragraph 9(b).

28. The total amount of benefits pursuant to paragraph 15 of the "Agency Manager's Agreement," which would be due each plaintiff (designated as an Agency Manager) under the applicable contract in question, assuming each respective plaintiff should prevail in this action; is:

R. E. Fraver	$38,800.00
Hubert Hampton Martin	$28,552.00
William A. Pleasant	$16,203.00
*Jimmy McElreath	$26,402.00
*Mike Steiner	$13,340.00
William A. Davenport, Jr.	$16,645.00
Max K. Roberts	$44,174.00
Ted Bright	$21,124.00
*Billy Ray Staley	$23,609.00
Robert L. Dobbins	$19,381.00
Ron Worthington	$51,854.00
*David Breeden	$14,882.00
*Harry Horney	$19,282.00
*Robert J. Womble	$26,308.00

*These individuals are precluded from obtaining any recovery due to the Court's previous order holding hat a ten-year cliff vesting schedule applies pursuant to ERISA. All of

these individuals were with the defendant for a period of less than 10 years and plaintiffs agree that by virtue of the Court's previous order plaintiffs would be barred from recovering at the trial Court level. Plaintiffs reserve their right to pursue an appeal on this issue once a final judgment on the merits is entered.

29. The total amount of benefits pursuant to paragraph 14 of the "Agent's Contract," which would be due each plaintiff (designated as an agent) under the applicable contract in question, assuming each respective plaintiff should prevail in this action, is:

*J. Rives Manning, Jr.	$18,333.00
*J. C. Faust	$16,206.50
C. B. Weatherly, Jr.	$10,428.00
Lee Williams	$10,394.50
*David Marion	$ 6,468.50
*James K. Wright	$ 5,332.50
*William Samuel Kirby	$ 9,860.00
Herbert M. Speas, Jr.	$21,561.00
*Linda G. Hamrick	$ 8,468.50
*Edward L. Lowder	$11,279.00
*Peggy Horney	$12,421.50

*These individuals are precluded from obtaining any recovery due to the court's previous order holding that a ten-year cliff vesting schedule applies pursuant to ERISA. All of these individuals were with the defendant for a period of less than 10

years and plaintiffs agree that by virtue of the Court's previous order plaintiffs would be barred from recovering at the trial Court level. Plaintiffs reserve their right to pursue an appeal on this issue once a final judgment on the merits is entered.

30. The beginning and ending contract dates for each plaintiff were as follows:

Plaintiff	Beginning Date
C. B. Weatherly, Jr.	9-67
R. E. Fraver	4-66
J. Rives Manning, Jr.	1-1-72
J. C. Faust	4-72
Hubert Hampton Martin	1-24-64
William A. Pleasant	4-1-59
Lee Williams	10-15-59
Jimmy McElreath	2-73
Mike Steiner	9-1-75
David Marion	9-1-75
James K. Wright	9-1-75
William A. Davenport, Jr.	12-57
Max K. Roberts	11-28-53
Ted Bright	5-1-62
Billy Ray Staley	11-1-71
William Samuel Kirby	10-75
Herbert M. Speas, Jr.	7-1-70
*Robert L. Dobbins	4-15-73
Linda G. Hamrick	6-75
Edward L. Lowder	1-1-73
Ron Worthington	3-1-73
David Breeden	8-74
Peggy Horney	5-1-75
Harry Horney	8-1-73
Robert J. Womble	8-1-74

Plaintiff	Ending Date
C. B. Weatherly, Jr.	7-18-80
R. E. Fraver	3-12-81
J. Rives Manning, Jr.	3-1-81
J. C. Faust	7-18-80
Hubert Hampton Martin	11-15-80
William A. Pleasant	9-1-79
Lee Williams	3-31-80
Jimmy McElreath	3-31-80
Mike Steiner	2-27-81
David Marion	6-1-81
James K. Wright	6-1-81
William A. Davenport, Jr.	7-31-80
Max K. Roberts	6-30-81
Ted Bright	5-24-81
Billy Ray Staley	8-8-81
William Samuel Kirby	12-31-81
Herbert M. Speas, Jr.	12-31-81
*Robert L. Dobbins	1-31-81
Linda G. Hamrick	10-1-81
Edward L. Lowder	3-15-82
Ron Worthington	4-23-82
David Breeden	8-16-82
Peggy Horney	10-31-82
Harry Horney	10-25-82
Robert J. Womble	9-1-82

*Plaintiff Dobbins signed an "Agent's Contract on 4-15-73. He became disassociated from defendant on 1-31-81. Beginning on 1-15-70, plaintiff Dobbins was a salaried employee of defendant, a claims representative, a position which he held until 4-15-73.

31. All of the plaintiffs became licensed to sell insurance in North Carolina within sixty days following

their disassociation from the defendant, before any payments were scheduled to begin under the "Retirement, Death and Disability Benefits" provisions of the Agreements (paragraph 15, "Agency Manager's Agreement" and paragraph 14, "Agent's Contract").

32. The utilization of agent's contacts and agency manager's contracts was instituted substantially at the same point in time, to-wit, the late 1950's or early 1960's. The use of such contracts was begun at the direction of the company's general manager, to-wit, C. D. Culp, for the purpose of compensating agents and agency managers for business generated by them during the term of their association with the company. The purpose or rationale behind the agent's contracts and the agency manager's contracts was the same. In sum, contracts for both or each group were

instituted by the same management at the same time and for the same purpose to-wit, to provide deferred compensation to the defendant's sales force who were paid on a commission basis.

33. Defendant has not established any fund or separate account to be used for the payment of benefits under paragraph 14 of the agent's contract or paragraph 15 of the agency manager's contract.

34. The benefits paid to the agents or agency managers pursuant to the agents or agency managers' contract are paid from the general funds of the defendant.

35. Within 60 days of plaintiff Pleasant's termination of his association with defendant, defendant invoked the condition precedent of his contract as to not being licensed to sell insurance within the state during the payment period, and refused to make payments to Mr. Pleasant.

36. On August 25, 1981, plaintiff Pleasant, among others, filed a breach of contract action in the North Carolina State Court system complaining that he had been wrongfully denied his retirement benefits. His cause of action was not predicated upon ERISA. That action as voluntarily dismissed on January 26, 1983.

37. Pleasant's complaint herein was not filed until February 14, 1983.

DISCUSSION

II. ERISA BACKGROUND AND THE EXCEPTION FOR HIGHLY COMPENSATED OR MANAGERIAL EMPLOYEES.

ERISA was enacted in 1974 to address a nationwide problem of abuse by employers of employee pension plans. As noted by Congress when it enacted the statute, ERISA's protections were thought to apply to some three (sic - should say thirty) million people or about half the nation's non-farm work force. 1974 U.S. Code

Cong. and Adm. News 4640, 4641.

The major protection which ERISA would accord to the plaintiffs here, as this Court has recognized in the past, would be to prevent the Farm Bureau from denying pension benefits to those plaintiffs who worked for Farm Bureau for sufficient time to meet the minimum vesting requirements and who are not otherwise excluded from the Act under some statutory exception. The specific exception at issue here is contained in Section 1051 of ERISA, establishing the extent of coverage of the vesting requirements, and saying that:

> "This part shall apply to any employee benefit plan . . . other than -
>
> (2) A plan which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly-compensated employees;"

29 U.S.C. Section 1051(2).

Nowhere in the statute are the terms "select," "highly compensated," or "management" defined, nor have there been regulations issued to clarify the terms. Moreover, the legislative history is largely silent as to what Congress meant to do when it created this exception, and there have been few cases interpreting the scope or the meaning of the section.

As to the term "primarily," a noted commentary has suggested that it may allow a plan to be excluded from ERISA's protection in cases when a few non-management or non-highly compensated employees participate. Goodman and Stone, "Exempt Compensation Arrangements Under ERISA," 28 Cath. U.L. Rev. 445, 464-465 (1979).

At the outset, defendant contended that two retirement plans were in effect for its commission paid sales force - one for its agents and one for its agency

managers, the latter being a select highly compensated group. In this regard, the Court recognizes that there are some minor differences in the method of calculating the amounts under the plan, owing to the difference in the method of calculating the commissions paid to agents and agency managers. The plan in either instance, however, bases retirement benefits on the amount of business done for which the agent or agency manager bears some responsibility. The court also notes that the time period for payment is also different between agents and agency managers, although the Farm Bureau has shown signs of removing this difference in the late stages of plaintiffs' employment by changing the agents' payout period to 10 years to match the agency managers'.

Aside from the minor differences discussed above, the retirement plan is

structured identically for agents and agency managers. Both are structured in the nature of "buy-out" plans, that is, monthly payments to the outgoing member of the agency force are deducted from the monthly commissions of his or her replacement. Both the agents' and agency managers' contracts contain effectively identical "bad-boy" provisions relating to licensing with other insurance companies during the payout period. Both contracts require five years' service with the Farm Bureau to qualify for benefits, and both state that the Farm Bureau will deduct any indebtedness to the company before making any payout. Both begin payment sixty days after retirement. Both contain identical language about forfeiting of benefits if the plan is terminated by fraud or criminal act. In short, there is one plan in operation, with slight

differences in calculation to account for slight differences in the compensation of the people involved, but one plan nonetheless.

Aside from the identical structure of the plan that appears in agents' and agency managers' contracts there are the indications that the Farm Bureau intended to create a single plan for its commission paid sales force. The Farm Bureau has an IRS qualified retirement plan for its salaried employees which does not include the commission paid sales force. The qualified plan includes the company's highly compensated, management employees who are on salary. It is apparent that the Farm Bureau intended to provide pension benefits protected by ERISA for those management employees. In order to argue that the agency managers are not protected, and that their plan is separate from the

agent's plan, it must then be inferred that the Farm Bureau intended, for some odd reason, to single out agency managers separately from the agents and separately from management to create vested pension benefits for everyone but them.

The inference is not warranted. As previously noted, use of the agents' and agency managers' contracts was instituted substantially at the same point in time at the direction of the same general manager of the defendant for the same purpose, to-wit, to provide deferred compensation for defendant's commission paid sales force. The defendant treated agency and agency managers exactly alike with regard to their entitlement to benefits and in interpreting the plan language applicable to each. In summation, the defendant simply created two plans, one for its salaried employees and one for its commission paid sales

force, the latter being constituted by its agents and agency managers in the aggregate, and of which agency managers were a minor portion. No evidence has been produced from which it can be found that the commission sales force constitutes a select group of management or highly compensated employees. Hence defendant's plan fails to fall within the exception to ERISA contained in Section 1051 thereof, but to the contrary, defendant's plans are subject to the terms of ERISA.

In an effort to avoid this conclusion, defendant contends that members of its commission paid sales force (agents and agency managers) employed by it for five or more years constitute a select group of management or highly compensated employees, and it has introduced

statistical evidence in support of this contention.[1]

Defendant's contention is without merit. Defendant's plan benefits all members of the commission paid sales force. The employment contracts of all such persons contain the plan provisions, as opposed to plan provisions being contained only in employment contracts for sales personnel with five or more years' service. The five year service requirement is not a plan parameter defining who was covered by the plan, but is a vesting provision equally applicable to all plan members. That a vesting provision is not to be considered as a plan parameter is clearly indicated by the definition of "participant" in ERISA, to-wit:

---

1 A contention not raised in any pre-trial pleading or order.

> An employee or former employee of an employer...who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of any such employer.

29 U.S.C. 1002(7) (emphasis added).

For the reasons heretofore articulated, the Court finds that the agents and agency managers' contracts constitute a single unfunded employee benefit plan maintained by the defendant for its commission paid sales force, and that the same is not a plan primarily maintained for the purpose of providing deferred compensation for a selected group of management of highly compensated employees so as to exclude such employees pursuant to 29 U.S.C. Section 1051(b) from the protection otherwise afforded them under ERISA.

APPLICABILITY OF THE STATUTE OF LIMITATIONS TO THE CLAIM OF WILLIAM PLEASANT

Plaintiff Pleasant terminated his

employment with the defendant on October 1, 1979, and became licensed to sell insurance for companies other than the Farm Bureau within 60 days thereafter. He was shortly notified by the Farm Bureau that he would not be paid his retirement benefits. On August 25, 1981, plaintiff Pleasant, among others, filed an action in the North Carolina State court system claiming that he had wrongfully been denied his retirement benefits. That action with regard to the retirement claim was voluntarily dismissed on January 26, 1983, and the present action was filed on February 14, 1983.

Because ERISA does not contain a statute of limitations, the Court looks to state law to determine the most appropriate statute. Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan, 713 F.2d 247 (7th

Cir. 1983); Miles v. New York State Teamsters Conference Pension and Retirement Fund, 698 F.2d 593 (2d Cir. 1983), cert., denied, _____ U.S. _____, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983).

In North Carolina, the limitations period for liabilities created by statute, either state or federal, is three years absent some provision to the contrary in the statute. N.C.G.S. Section 1-52(2). The federal court is not bound by this particular statute of limitation since its adoption of state law is a matter of federal concern, governed by federal standards. The task of the federal court is to determine which state statutes are most appropriate after analyzing the underlying nature of the federal claim as well as the federal policies involved. Jenkins, 713 F.2d at 251; Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976).

The question of which state statute to adopt my not be particularly important in the present action because the most likely statute, other than N.C.G.S. 1-52(2) is the one for actions arising out of contracts, for which the statute is also three years. N.C.G.S. 1-52(1). Several federal courts in ERISA cases have viewed the state statute for contract actions as being the most appropriate. Jenkins, 713 F.2d at 253; Livolsi v. City of Newcastle, 501 F.Supp. 1146, 1151 (W.D.Pa. 1980); Dameron v. Mount Sinai Hospital of Baltimore, 595 F.Supp. 1404 (D.Md. 1984). In any event, the Court finds three years to be the limitation applicable to plaintiffs' claims.

Of more significance here is whether a North Carolina state rule on tolling of the statute of limitations should apply. An action in North Carolina courts

dismissed without prejudice by a plaintiff in a manner such as this was done may be recommenced in state court on the same claim within one year after the dismissal. N.C.G.S. Section 1A-1, Rule 41(2) (sic - should say 41(a)). This one year rule acts to extend the statute of limitations so that the action may be brought any time within the year notwithstanding that the statute might otherwise have run during the year. Whitehurst v. Virginia Dare Transportation Co., 19 N.C.App. 352, 355-356, 198 S.E.2d 741, 742-743 (1973).

Plaintiff Pleasant's claim was timely filed in North Carolina within the applicable three-year period after his action accrued. His claim asserted in this action was filed in this Court more than three years after such accrual but less than one year after the dismissal in the state court. Therefore, Pleasant's

claim here is barred by the three year statute of limitations unless the one-year rolling rule applies.

It is the Court's view that the one year tolling rule does not apply. the key consideration in this regard is whether the State Court had jurisdiction over the previous action brought by Pleasants (sic) against the Farm Bureau.

In the State action commenced August 25, 1981, the plaintiffs alleged two separate causes of action against the defendant. The second cause of action involved the "retirement benefits" in the agents' and agency managers' contracts, which are the subject of the action before this Court. The State Court complaint, as to count two, specifically stated that the plaintiffs had met all "valid and enforceable" conditions of the agents and agency managers contracts and therefore the plaintiffs were entitled to

recover the benefits provided pursuant to the contracts. However, in order to recover those benefits the plaintiffs would have to have a portion of the contract, the forfeiture provisions relating to being licensed to sell insurance for another company, declared invalid. The plaintiffs, at some point after the initiation of the State Court litigation, asserted that the forfeiture provision was unenforceable due to the vesting provisions of ERISA. Plaintiffs were seeking to have the Court interpret and apply ERISA to the agent's and agency manager's contract and have a portion of the "plan" declared illegal pursuant to ERISA. The defendant moved for Summary Judgment as to the second count of plaintiffs' complaint on the grounds that the State Court lacked jurisdiction. Immediately prior to the Court ruling on the motion the plaintiffs took a

voluntary dismissal as to the second count.

Section 502 of ERISA (28 U.S.C. Section 1132) governs civil enforcement under ERISA. Section 502(e)(1) provides that, except for actions under subsection (a)(1) of section 502, the District Courts of the United States shall have exclusive jurisdiction of civil actions under Title I of ERISA brought by the Secretary or by a participant, beneficiary, or fiduciary. The statute goes on to state that State Courts of competent jurisdiction and District Courts of the United States shall have concurrent jurisdiction of actions under Section 502(a)(1)(B).

Therefore, Congress has given the United States District Courts exclusive jurisdiction over all matters concerning civil enforcement under ERISA, except for the narrow area covered by Section

502(a)(1)(B).

Section 502(a)(1)(B) reads as follows:

> to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; (emphasis added).

A review of the committee reports and cases which have interpreted Section 502(a)(1)(B) made it clear that a person's right to bring an action in the State Court would by only to collect benefits under a plan and would not include situations involving the application of Title I of ERISA.

The Conference Committee Report pertaining to Section 502 states in pertinent part:

> Under the conference agreement (i.e. the conference agreement which was ultimately enacted into law), civil actions may be brought by a participant or beneficiary to recover benefits under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility. The U.S. District Courts are to have exclusive jurisdiction with respect to

> actions involving breach of fiduciary responsibility, as well as exclusive jurisdiction over other actions to enforce benefit rights provided under Title I. However, with respect to suits to enforce or clarify benefit rights under the plan, or to recover benefits under the plan which do not involve application of the Title I provision, they may be brought, not only in the U.S. District Courts but also in State Courts of competent jurisdiction . . . .

1974 U.S. Congressional & Legislative News, p. 5107.

The Conference Committee Report specifically explains that the Federal District Courts have exclusive jurisdiction over actions to "enforce or clarify benefit rights provided under Title I" (emphasis added). Title I is the portion of ERISA which deals with basic requirements and benefits which retirement plans must contain, such as minimum vesting, nondiscrimination and Fiduciary Responsibility. Thus, the Conference Committee Report clearly indicates the different areas of

jurisdiction for the Federal and State Courts.

The State Courts are granted concurrent jurisdiction to award benefits under a particular plan. In other words, the State Court has jurisdiction to hear a case where a participant sues to collect benefits under the specific terms of his plan, such as where an employer refuses to pay benefits which are specifically called for under a plan. The key words in Section 502(a)(1)(B) are "his plan," and "the terms of the plan." Congress clearly felt that the State Courts could take a written document ("his plan" or "the plan"), read it, and determine the benefits written out in that document, just as it would determine the amount due under a construction or sales contract. Such a case would not involve the application or interpretation of any of the ERISA requirements or a

determination of whether ERISA applied.

However, were a participant to come into Court and allege that a particular plan does not meet the minimum vesting requirements of ERISA, then that would be an action "to enforce or clarify benefit rights provided under Title I." Conference Committee Report, Section 502. This type of action would have to be brought in the Federal Court.

The reasoning of Congress in restricting the State Court to hearing cases only involving interpretation of the benefits provided under a specific written plan or contract is one of uniformity. Congress wanted all interpretation of the actual statutory provisions and requirements of ERISA to be uniform. The Department of Labor and Internal Revenue Service did not want to have to deal with fifty different States' interpretation of the meaning of any

specific statutory provision.

Congressman Dent, Chairman of the Subcommittee of Labor of the House Committee on Labor and Education further explained the Congressional concern on this point:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal Authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local legislation. See Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1224 (ND Cal. 1977), aff'd, 571 F.2d 502 (9th Cir. 1978), cert. denied, 439 U.S. 831 (1978).

In Guthrie v. Dow Chemical Company, 445 F.Supp. 311 (S.D. Texas 1978), the Court dealt with the question of State jurisdiction over Title I questions. In Guthrie, employees of Dow Chemical brought a State Court action claiming that a challenged portion of the retirement plan, whereby a retirement

fund was entitled to credit for workmen's compensation benefits paid, was illegal because it was in violation of Texas and United States laws and Constitution. The employer, defendant, attempted to remove the action to Federal District Court.

The plaintiffs were seeking relief under Title I of ERISA, 29 U.S.C. Section 100k, et seq., by saying that it was illegal for the retirement fund to be entitled to credit for workmen's compensation benefits paid. The Court noted that Congress had indicated a clear intent to preempt the entire area of regulation of all covered pension plans, citing Section 514(a) of ERISA, 29 U.S.C. Section 1144(a). 445 F.Supp. at 313. Therefore, there was a federal question involved and the case would qualify as removable under 28 U.S.C. Section 1411(a) if the State Court had proper jurisdiction of the cause of action. In

order to be removable to Federal Court, the State Court must have jurisdiction over the matter.

The plaintiffs contended that the State Court had jurisdiction over the subject matter of the action pursuant to Section 502 of ERISA. 29 U.S.C. Section 1132. The plaintiff, in particular, contended that their claim asserted a civil action "to clarify his rights to future benefits under the terms of the plan ..." 445 F.Supp. at 314.

The Court, however, stated that the plaintiffs did not seek to recover benefits under the plan or to clarify their rights to future benefits under the terms of the plan, but rather sought to have a portion of the plan declared illegal because it is alleged to be in violation of certain unspecified portions of ERISA.

The Court went on to explain why the

action did not fall into the parameters of Section 502(a)(1)(B):

> Section 1132(a)(1)(B) (Section 502(a)(1)(B) of ERISA) is obviously designed to cover that situation in which a defendant refuses to pay benefits due under the terms of a plan, or where for certain reasons, a plaintiff seeks to clarify his rights to future benefits, without actually challenging the validity of a portion of the plan or seeking a construction of the ERISA statute. (emphasis added)

The Court, therefore, held that since a State Court would not have jurisdiction, the case could not be removed to Federal Court.

A state Court has also examined the question of when the State Court has jurisdiction over civil actions based on ERISA. In Young v. Sheet Metal Workers International, 447 N.Y.S. 2d 798 (1981), the Court examined whether it had jurisdiction to consider the question of wrongful removal of employees from membership in the plan.

The Court examined 29 U.S.C. Section 1132 which deals with the appropriate forum for prosecuting a civil action under ERISA. In its analysis the Court recognized that there was federal domination over the "establishment, conduct, supervision and regulation of pension and retirement plans covered by the statute," and that federal law preempts the field. The federal preemption, noted the Court, was not only a result of superior federal interest in the regulation covered plans, but also "reflects a pragmatic interest in consistency and simplicity." 447 N.Y.S. 2d at 802.

Thus, in line with this policy of total federal preemption, Congress intentionally markedly restricted access to State Courts. Thus, the Court in Young specifically held that the words "... under the terms of the plan" (29

U.S.C. Section 1132(a)(1)(B) must be read restrictively. The Court stated:

> That is, actions falling within the scope of that exception include only those wherein the participant or beneficiary asks the Court, as in a typical contract action, to construe or apply the terms of the plan to the facts of his/her particular issue. 447 N.Y.S. 2d at 803.

Thus in applying this principal (sic), the Court held that:

> The instant action concerns itself not with the clarification or enforcement of benefits or rights as prescribed by the plan, but rather with an effort by plaintiffs to forestall what they allege to be their wrongful removal from coverage by the plan. Such an action calls into question issues beyond the plan itself and removes this action from this Court's jurisdiction. 447 N.Y.S. 2d. at 803.

The Courts in Guthrie and Young reiterated the position explained in the Committee Reports, that if the plaintiff is seeking a construction of the ERISA statute, then the State Courts will not have jurisdiction.

In the case at bar, the plaintiffs'

claim based on ERISA does not fall within the parameter of Section 502(a)(1)(B) as they (sic) are explained by the Committee Reports and case law. The plaintiffs are not attempting to collect under the terms of the plan, since the terms of the plan preclude the plaintiffs from recovery of any benefits. Rather, the plaintiffs' only means of recovery is for a construction and application of the ERISA statute, and an application of the vesting requirements of ERISA. The plaintiffs are basically asking the Court to rewrite the contract applying the ERISA requirements of Title I. Such a cause of action is one which Congress designated to be decided only by Federal Courts, since it was the intention of Congress for the Federal law to preempt the area. Congress desired uniformity and that can best be accomplished by the ERISA state only being interpreted by the

Federal Courts.

The plaintiffs were not asking for the State Court to simply interpret or apply the terms of the contract. If the State Court did that, it would apply the forfeiture provisions and the plaintiffs would have been denied recovery. In the plaintiffs' complaint in State Court, they sought to have a portion of the agent's or agency manager's contract declared invalid and thereby recover their benefits. However, the State Court had no jurisdiction and no power to declare that provision invalid pursuant to ERISA and the State Court lacked subject matter jurisdiction.

Thus, with there being no State Court jurisdiction the plaintiffs would not be entitled to rely on the one year savings provision in Rule 41 of the North Carolina Rules of Civil Procedure. Plaintiff Pleasants' cause of action is

barred therefore by the applicable three (year) Statute of Limitations.

YEARS OF SERVICE - ROBERT DOBBINS

Robert Dobbins was employed as a regular employee of Farm Bureau as a claims representative in the home office of the Farm Bureau. He began his position as a claims representative on January 15, 1970. He worked in this position until April 15, 1973, at which time he became an agent for the company in the Asheboro area, pursuant to an agent's contract. On or about October 15, 1977, Dobbins became an agency manager with the Farm Bureau, a position he held until January 31, 1981, at which time he terminated his relationship with the company. Since that time Dobbins has had no further relationship with the company. At issue is whether or not the period Dobbins served as claims representative should be

added to the period he served as an agent or agency manager in determining whether he meets the ten year cliff vesting requirement.

ERISA requires that all full-time service for an employer shall count toward vesting, even if the employee changes positions in the company during the period. The statute says that:

> In computing the period of service under the plan for purposes of determining the non-forfeitable percentage under [the vesting schedules], all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account. ERISA, 29 U.S.C. Section 1053(b)(1).

The statute lists seven exceptions to that rule which do not apply here, dealing mainly with service before certain dates, before certain ages of the employee, with breaks in service, or with withdrawal by the employee from the plan. 29 U.S.C. Section 1053(b)(1)(A)-(G).

The legislative history is clear that

"all" years of service, aside from the stated exceptions, is to be taken literally. The House Ways and Means Committee Report noted that:

> Once an employee becomes eligible to participate in a pension plan, generally all his years of service with an employer, including pre-participation service, are to be taken into account for purposes of determining his place on the vesting schedule... Service for an employer is to be taken into account for purposes of placement on a vesting schedule, even though the service was in a different division of the corporation. H. Rep. No. 93-807, 1974 U.S. Code Cong. and Adm. News 4722.

There is no evidence whether Dobbins was covered by a pension plan while he was a claims adjuster, but this does not matter for purposes of vesting. The rule is that years of service in a division of a company which does not have a pension plan count toward vesting if the employee moves to a division which does have a plan. These years would not count for purposes of accrual of benefits and (sic)

plans for which benefits are calculated based on years of service. Id., pp. 4722-23. But this is not relevant to the present action because benefits are not calculated based on accrual for members of the agency force, and the years of participation do count toward vesting.

Therefore, all of plaintiff Dobbins' years of service must be counted toward vesting of his retirement benefits and he has met the 10-year service requirement.

CONCLUSIONS OF LAW

1. The plaintiffs were employees of defendant for the purposes of determining the applicability of ERISA to the contractual benefits set forth in the Agents and Agency Managers' contracts with defendant;

2. The Agents and Agency Managers' contracts constitute a single unfunded employee benefit plan maintained by an employer primarily for the purpose of

providing deferred compensation for its commission paid sales force. Such plan is covered by ERISA.

3. The provisions of the Agents and Agency Managers' contracts in question contain a "cliff vesting" type provision. Each plaintiff has violated the forfeiture provisions of his respective Agents or Agency Managers' contract but for the application of ERISA. The forfeiture provision of the Agents and Agency Managers' contract is valid as to any plaintiff with less than 10 years of service with defendant.

4. The Agents and Agency Managers' contracts which are "plans" as covered by ERISA, provide for payments to begin 60 days following termination of the respective contracts. Such payment date in each of the respective contracts constitutes a "normal retirement age" within the meaning of 29 U.S.C. Section

1056.

5. The defendant's plan maintained for its commissioned sales force included agents and agency managers, and was not primarily for the purpose of providing deferred compensation for a select group of highly compensated employees so as to exclude such employees pursuant to 29 U.S.C. Section 1051(b) from the protections otherwise afforded by ERISA.

6. The applicable statue of limitations in this matter has run against plaintiff William A. Pleasant.

7. Plaintiff Robert L. Dobbins had more than 10 years of eligible service under the established plan and is not barred from recovering benefits pursuant to his contract.

8. The following plaintiffs who were employed by defendant pursuant to Agent's contract were with defendant for a period in excess of 10 years and are therefore

due a recovery in an amount as specified below, to be paid out pursuant to the terms of each plaintiff's contract of employment:

C. B. Weatherly	$11,470.00
Lee Williams	10,638.00
Herbert M. Speas, Jr.	23,837.00

9. The following plaintiffs were employed by defendant pursuant to Agency Managers' contracts for a period in excess of 10 years and are therefore due a recovery in the amount as specified below, to be paid out pursuant to the terms of each plaintiff's contract of employment.

R. E. Fraver	$38,800.00
Hubert Hampton Martin	28,552.00
William A. Davenport, Jr.	16,645.00
Max K. Roberts	44,174.00
Ted Bright	21,124.00
Robert L. Dobbins	19,381.00
Ron Worthington	51,854.00

10. Within 90 days of the date hereof, recovering plaintiffs shall be paid by defendant the sums respectively due them to the extent that payments to

them under their respective contracts are in arrears. Said sums shall bear interest from the respective installment due dates until paid.[2]

SO ORDERED.

This 30th day of August, 1985.

/s/ James C. Fox
JAMES C. FOX
United States District Judge

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2 Counsel are directed to provide the Court with sufficient information to compute the interest to be paid in accordance with this order.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-2076
No. 85-2077

R. E. Fraver, et al,

Appellees,

versus

North Carolina Farm Bureau
Mutual Insurance Company,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge.

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Russell and Judge Sprouse.

For the Court,

JOHN M. GREACEN

ds:A1405

APPENDIX E

UNITED STATES COURT OF APPEALS

No. 85-1623

Robert T. Darden,

Appellant,

versus

Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Terrence W. Boyle, District Judge. (83-96-CIV-3).

Argued: December 3, 1985

Decided: July 15, 1986

Before MURNAGHAN, SPROUSE and SNEEDEN,* Circuit Judges.

Marion G. Follin, III (Smith, Patterson, Follin, Curtis, James & Harkavy on brief) for Appellant; Walker Y. Worth, Jr. (Russ, Worth & Cheatwood on brief) and

Craig G. Dalton, Jr. (Moore, Ragsdale, Liggerr, Ray & Foley, P.A. on brief) for Appellees.

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* The Honorable Emory M. Sneeden resigned from the court before the case was decided. He did not participate in the decision.

MURNAGHAN, Circuit Judge:

Robert Darden appeals from the decision of the United States District Court for the Eastern District of North Carolina granting summary judgment for defendant Nationwide Mutual Insurance Company on Darden's claim for retirement benefits on the basis of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1001, et seq.

I.

From 1962 until November 1980, Darden acted an an insurance agent for Nationwide Insurance Company in Fayetteville, North Carolina. During that period, Darden represented Nationwide exclusively. While Darden enjoyed a substantial degree of freedom to operate his agency as he chose, his freedom was limited by a number of requirements imposed by Nationwide. Darden was compensated through

commissions, rather than through a fixed salary.

The relationship between Darden and Nationwide was governed by a series of eight successive agency contracts. Each of the agency contracts provided for Darden's participation in a retirement and deferred compensation plan for insurance agents referred to as the "Agent's Security Compensation Plant." The Agent's Security Compensation Plan consisted of two programs known as the "Deferred Compensation Incentive Credit Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Incentive Credit Plant, Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to pay Darden, upon his

retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months.

The agency agreements also provided that Nationwide's obligation to pay benefits under the Agent's Security Compensation Plan would terminate if a former agent engaged in the fire, casualty, health, or life insurance business, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a twenty-five mile radius of the former business location of the agent. Nationwide's obligation would also cease if the former agent, at any time after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. The agency agreements between Nationwide and Darden

provided further that either party had the right to cancel the agreement at any time after written notice.

Nationwide exercised its right to terminate the agreement on November 20, 1980. One month following the termination of the agreement, Darden opened a new business as an independent insurance agent, representing various competitors of Nationwide. He operated the new business at the same location he had previously used as a Nationwide agent. Nationwide then notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the Agent's Security Compensation Plan.

The most recent statement which Darden had received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664.00 in the Deferred Compensation Plan and $65,706.00

in the Extended Earnings Plan. Under the election which Darden had on file with Nationwide at the time of his termination, he was entitled to approximately $490.00 per month for the remainder of his life, to begin within sixty days after his termination, under the Extended Earnings Plan. He was also entitled to approximately $120.00 per month for the remainder of his life, to begin at age 50, under the Deferred Compensation Incentive Plan. At his termination in 1980, he was 46 years of age.

Darden filed the present action on November 8, 1983, seeking to benefit from the terms of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001 et seq. Under ERISA, an employee's right to receive retirement benefits from an employer-sponsored retirement plan must vest, thereby

becoming nonforfeitable, after a period of time to be determined according to one of three alternative methods. 29 U.S.C. Section 1053(a).[1] Darden based his claim to relief on Section 502(a) of the Act, 29 U.S.C. Section 1132(a), which provides that a participant in or a beneficiary of an employee retirement income security plan may bring a civil action to enforce the provisions of the Act and to recover benefits due him. Darden accordingly sought to enforce the Act's nonforfeitability requirements and to recover the benefits claimed to be due to him under the provisions of Nationwide's Agent's Security Compensation Plan.

Following discovery, both parties moved for summary judgment. The matter was referred to a magistrate, who recommended that summary judgment be granted for Darden. The district court

rejected the magistrate's recommendation and granted summary judgment for Nationwide on the ground that Darden did not qualify as an employee within the scope of ERISA and therefore had no enforceable rights against Nationwide derived from that Act. Darden now appeals from the district court's decision.

II.

To maintain an action based on Section 502(a) of ERISA, 29 U.S.C. Section 1132(a),[2] Darden must qualify was a "participant" in an employee benefit plan. The Act defines a "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . ." 29 U.S.C. Section 1002(7). Thus, Darden's right to pursue an ERISA-based

claims against Nationwide depends upon whether he may properly be treated as an "employee" for the purposes of ERISA, or whether he falls into the independent contractor category.

The statute itself provides little guidance concerning the interpretation to be given the term "employee" in the ERISA context. "Employee" is defined simply as "any individual employed by an employer." 29 U.S.C. Section 1002(6). Perhaps as a result of this lack of explicit statutory guidance, the few courts that have considered the question have looked to definitions of the employer-employee relationship developed in other areas of law.

One such approach involves the application of the traditional common-law standard for identifying the relationship of master and servant. See Short v. Central States Pension Fund, 729 F.2d 567

(8th Cir. 1984); Richardson v. Central States Pension Fund, 645 F.2d 660 (8th Cir. 1981); Wardle v. Central States Pension Fund, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).[4] The principal element of the common-law standard is the extent of one party's right to direct and control the performance of the other. Short v. Central States Pension Fund, 729 F.2d 567, 572 (8th Cir. 1984); Restatement (Second) of Agency Section 220 (1957); Prosser and Keeton on Torts, Section 70 at 501 (5th ed. 1984). Many factors are considered in determining whether there is such a right to control, including the degree of one party's supervision of the details of the other's work; whether the two parties are engaged in distinct businesses or occupations; who supplies the place and instrumentalities of the work; the duration of the relationship

between the parties; the method of payment; and other factors.[5]

Under such traditional common law principles, Darden most probably would not qualify as an employee. Darden was relatively free to run his business as he chose. Darden was able to exercise his independent judgment as to the time, place and manner of soliciting and selling insurance and serving policy holders. He was able to hire and fire clerical employees without securing Nationwide's approval, though he could not on his own hire additional insurance agents. On the other hand, Nationwide monitored Darden's operations and imposed several restrictions on his activities. He was instructed not to provide price quotations over the telephone to customers. He was also directed to collect a full six months' premium for automobile insurance at the inception of

the policy, and was not permitted to allow the customer to pay part of the premium after 45 days. He was required to ask questions of automobile insurance applicants in a manner in line with a certain Nationwide-mandated procedure, to set up a claims log file, to review his files and to contact policy holders 60 days before the renewal date of a policy, to have his secretaries attend training sessions sponsored by Nationwide, to inspect personally the automobiles of applicants for automobile insurance, and to meet personally with every youthful male applicant for automobile insurance. While Darden was not required to prepare regular reports for Nationwide concerning his activities, he was subject to unannounced audits by Nationwide's accountants. Nationwide encouraged Darden, but did not compel him, to attend training seminars offered by Nationwide.

Darden was compensated through commissions, rather than through a salary. He paid his business expenses out of his commissions, including office maintenance and utilities and the salaries of his clerical staff. Darden owned the building housing his agency's offices and the furniture used there, as well as an automobile maintained for business purposes. He did not, however, own his business in a complete sense, because he was not entitled to sell the business as a going concern. Under the terms of the agency agreements between Darden and Nationwide, the good will and the value associated with the servicing of existing policies reverted to Nationwide upon the termination of the agency relationship. In their dealings with each other, Darden and Nationwide referred to their relationship as one between independent contractors. Darden

was not entitled to receive certain benefits reserved for Nationwide "employees," such as life insurance, health insurance, and paid annual leave. Darden received his commissions without deduction by Nationwide for income tax or other charges.

We conclude, however, that the common-law test for the relationship of master and servant is not the appropriate standard for application here. The Supreme Court has emphasized on two occasions that the definition of "employee" should be tailored to the purposes of the statute being construed. United States v. Silk, 331 U.S. 704, 713 (1947) (defining "employee" for the purposes of the Social Security Act); NLRB v. Hearst Publications, 322 U.S. 111, 120-29 (1944) (defining "employee" for the purposes of the National Labor Relations Act). In both cases, the Court

rejected the argument that the term "employee" as used in federal statutes should be interpreted in accordance with the common-law standard. The Court pointed out that the common-law test, which emphasizes the elements of supervision and control, was developed for the purpose of determining whether the extent of one person's control over the actions of another was sufficient to justify the imposition of vicarious liability on the controlling person for the wrongful acts of the person subject to control. Silk, 331 U.S. at 713; Hearst, 322 U.S. at 129. Instead, the Court explained, the content of the term "employee" in the context of a particular federal statute is "to be construed 'in light of the mischief to be corrected and the end to be attained.'" Silk, 331 U.S. at 713, quoting Hearst, 322 U.S. at 124. In interpreting statutory language so as

to define the class of persons protected by the statute, a court must take as its "primary consideration" whether the inclusion of the disputed category of persons would effectuate the "declared policy and purposes" of the statute. Silk, 331 U.S. at 713; Hearst, 322 U.S. at 131-32.

The purposes of ERISA are explicitly set forth in Section 2 of the Act, 29 U.S.C. Section 1001. Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits." Because employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," Congress felt that it was desirable in the interests of the free flow of commerce, as well as in the interests of individual employees and

their beneficiaries, to enact minimum standards "assuring the equitable character of such plans and their financial soundness."

This statement of congressional purpose provides us with useful guidance in fashioning a standard to be used in determining whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA. The protected class described in the statement of purpose encompasses, first of all, persons whose retirement benefits were "anticipated." In other words, the "employer" or sponsor of the pension plan must have taken some action that created a reasonable expectation on the "employees'" part that benefits would be paid to them in the future. Second, persons within the protected class must

have relied on that expectation by remaining for "long years," or a substantial period of time, in the "employer's" service, and by foregoing other significant means of providing for their retirement. It is that category of persons--those for whom the forfeiture of accrued employee benefits results in financial hardship during retirement--that was the focus of congressional concern. Finally, implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits. Has they possessed such bargaining power, statutory reform would have been unnecessary.[6] Evidence of the extent of the "employer's" control may, of course, be relevant to a determination of relative bargaining power.

Viewed from that perspective, Darden's case appears substantially stronger. By establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him.[7] There is also evidence in the record indicating Darden's reliance on that expectation. He remained with Nationwide for eighteen years--a period which exceeds the length of service prescribed by Congress for the vesting of benefits under any of the three methods described in Section 1053(a). Moreover, Darden was obliged to forego at least once alternative method of providing for his retirement that would normally have been available to an independent contractor: because much of the value of a Nationwide agency reverted to Nationwide upon the agent's termination,

Darden was not able to build up equity in his business which could eventually be transformed into cash through the sale of the business. On the other hand, there is no indication in the record as to whether Darden pursued other methods of providing for his retirement which would have significantly reduced his reliance on the Nationwide benefit plan. Nor is there any evidence as to whether a failure to make such alternative provisions would have been reasonable in light of the common practices of other Nationwide insurance agents. Finally, the evidence concerning the respective bargaining strength of the parties is incomplete.

It appears that the parties have oriented their factual presentations toward the common-law test of master and servant, a standard which we now reject in favor of one focusing on the

objectiveness and purposes of ERISA. Applying the approach we now endorse, we are not satisfied that the facts have been sufficiently developed to insure ripeness for decision at the summary judgment stage. Further factual development relevant to the purposes of ERISA, either by additional materials submitted in support of a renewed motion for summary judgment, or by trial, would be appropriate. We conclude that the district court's focus of attention on the common law master/servant issue did not result in a decision properly attuned to the pertinent considerations.

III.

Nationwide further contends that, even if Darden is assumed to be an employee for the purposes of ERISA, the district court's judgment may, nevertheless, be upheld on other grounds. Nationwide points out that the nonforfeitability

requirements of 29 U.S.C. Section 1053(a) apply only to "pension plans" and not to other forms of employee benefit plans. Thus, Nationwide's provision for forfeiture upon a terminated agent's entry into competition with Nationwide is invalid only if Nationwide's Agent's Security Compensation Plan qualified as a "pension plan" within the meaning of the Act. Nationwide advances two theories in support of its argument that is plan did not so qualify.

Nationwide argues, first, that its plan constituted a "severance pay plan." Regulations issued by the Secretary of Labor, pursuant to statutory authority under 29 U.S.C. Section 1002(2)(B), provide that a severance pay plan does not qualify as a pension plan for purposes of ERISA if: (1) the severance payments are not contingent upon the employee's retirement; (2) the total

amount of severance payment does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of this service; and (3) all such payments to any employee are completed within 24 months after the termination of the employee's service. 29 C.F.R. Section 2510.3-2. Nationwide's Agent's Security Compensation Plan plainly fails to satisfy the third prong of that test. Under the terms of the plan, Darden was entitled to, and indeed did, elect to receive benefits in the form of a life annuity. Moreover, under the Deferred Compensation Incentive Credit portion of the plan, Darden's benefit payments would begin only when he reached the age of 50--four years after his termination at age 46. Thus, it is manifest that Nationwide's plan did not provide for the

completion of payments to Darden within 24 months following his termination.

Nationwide also contends that its plan is not subject to the vesting and nonforfeitability requirements of Section 1053(a) by virtue of Section 1051(2), which exempts from those requirements any plan "which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."[8] In the present posture of the case, however, whatever the ultimate disposition may be, the question is not suited for summary judgment disposition, because several disputed issues of fact remain.

First, the parties disagree as to whether Nationwide's plan is funded or unfunded, and both parties have produced evidence to support their respective

positions. Nationwide relies on the affidavit of George W. Frink, Nationwide's Vice President for Marketing Services, who has stated that the plan is unfunded. Darden, on the contrary, points to the agents' benefit handbook prepared by Nationwide, which stated that the Deferred Compensation Incentive Credit portion of the plan was funded as benefits accrue, although the Extended Earnings portion of the plan would be funded only upon cancellation of the agent's contract. Darden also points to the deposition of Elton Parker, the personnel director of Nationwide's Raleigh office, who stated that both portions of the plan were funded.

The facts are also in dispute as to whether the Agents' Security Compensation Plan was limited to a "select group" of "highly compensated employees." The term "select group" seems to imply a small

percentage of the total number. In Belka v. Rowe Furniture Corp., 571 F.Supp. 1249, 1252 (D. Md. 1983), the district court held that a plan which covered only 4.6% of total employees was limited to a "select group." Here, the parties have presented no evidence as to the percentage of Nationwide's total employee complement who participated in the Agents' Security Compensation Plan.

There is also a dearth of evidence as to whether the insurance agents covered by the plan were "highly compensated" in relation to Nationwide's other employees. Nationwide asserts, but has not substantiated, that the average compensation of its agents in 1980 was $44,773, while the average compensation of "all Nationwide employees" in 1980 was $16,510. Even assuming the correctness of those figures, however, a lack of further clarification prevents their

intelligent evaluation. We are not told, for example, whether the $16,510 figure is the average of all employees including the agents or excluding the agents. Nor are we told how the agents' compensation is calculated, or whether it is adjusted so as to be comparable to the compensation paid to salaried employees. Nationwide's comparison may be between apples and oranges. It is clear, then, that disposition by way of summary judgment of the question of exemption under Section 1051(2) would be inappropriate.

IV.

We vacate, rather than reverse, the district court's decision, so that on remand the parties may have an opportunity to structure their factual and legal presentations concerning Darden's status as an employee within the meaning of ERISA in a manner consistent

with the approach we have outlined above. Alternatively, or if Darden is found to qualify as an employee, the district court should allow the parties to present further evidence on the question whether Nationwide's plan constituted an unfunded part for the compensation of a select group of highly compensated employees.

VACATED AND REMANDED.

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1 Under the first method, the plan must accord an employee a non-forfeitable right to 100% of his accrued pension benefits upon completion of ten years of service with the employer. 29 U.S.C. Section 1053(a)(2)(A). Under the second method, the plan must provide the employee with a nonforfeitable right to a percentage of accrued benefits increasing with each year of service, beginning with 25% of accrued benefits after five years' service and ending with 100% after fifteen years. 29 U.S.C. Section 1053(a)(2)(B). Under the third method, the employee's nonforfeitable percentage of accrued benefits increases with respect to

both the employee's years of service and his or her age. Fifty percent of the employee's accrued benefits must become nonforfeitable when the employee has completed at least five years of service and the sum of the employee's age and years of service equals or exceeds 45. One hundred percent must become nonforfeitable when the employee has worked for the employer for at least ten years and the sum of the employee's age and years of service equals or exceeds 55. 29 U.S.C. Section 1053(a)(2)(C).

Under any of the three alternatives, the Agent's Security Compensation Plan for Darden had vested, immune from forfeiture, if Darden was an employee.

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2 Section 502(a) of ERISA, 29 U.S.C. Section 1132(a), provides in relevant part:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought--
>
> (1) by a participant or beneficiary--
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

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3 While an action may also be brought by a "beneficiary," 29 U.S.C. Section 1132(a)(1), (3), or by a "fiduciary," 29 U.S.C. Section 1132(a)(3), Darden makes no claim to a right of action in either of those capacities. A "beneficiary," for the purposes of ERISA, is a person other than one whose service resulted in the accrual of the benefits, but who is designated as the recipient of benefits accrued through the service of another. 29 U.S.C. Section 1002(8). Darden does not claim to be the beneficiary of benefits earned by someone else. Nor is there any indication in the record that Darden had any fiduciary responsibilities with respect to the Nationwide plan.

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4 It is not clear, however, that either the Seventh or Eighth Circuit intended to apply the common-law test to the interpretation of the term "employee" as it is used in the statute itself. Rather, all three of the cases appear to have involved

only claims that the plaintiffs were entitled to benefits under the terms of the particular pension plan alone, without raising an additional question as to the validity of the pension plan under ERISA. Accordingly, both courts interpreted the term "employee" as it was used in the pension plan document, not in the statute. That document, which was the same in all three cases--because all three cases involved the Central States Pension Fund--provided that its terms were to be construed according to Illinois law, and that the common-law definition of the master-servant relationship should control. Thus, in applying common-law principles, the Seventh and Eight Circuits appear to have been doing no more than giving effect to the intention of the parties to that particular pension plan agreement without considering whether ERISA might preempt or override the intention of the parties.

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5 The District Court for the Western District of Oklahoma took a slightly different approach in Soloway v. New York Life Insurance Co., No. 77-0849-D, slip. op. (W.D. Okla. 1978). Relying on cases which develop the definition of "employee" in the context of other federal statutes, such as the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, rather than on the common law, the district court adopted a six-factor test which is similar in application to the common-law standard. The six

factors included: (1) the extent to which the services in question are an integral part of the "employer"'s business; (2) the amount of the "employee"'s investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee"'s opportunities for profit for loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship. Having weighed the matter in that light, the Oklahoma district judge concluded, for the purposes of the case before the court, that the insurance agent concerned was not an employee for ERISA purposes.

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6 The importance of a disparity in economic bargaining power to a determination of employee status was recognized in Fraver v. North Carolina Farm Bureau Mutual Insurance Co., No. 83-129-CIV-5, slip op. at 15-17 (E.D.N.C. 1984), where the district court held that certain insurance agents qualified as "employees" for the purposes of ERISA.

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7 Darden's expectations were limited, of course, by the agency agreement's provision, present from the outset, that accrued benefits would be forfeited if Darden were to

complete with Nationwide following the termination of his agency relationship. However, it is precisely that sort of employer-imposed condition on the employee's anticipations that Congress intended to outlaw with the enactment of ERISA. Under ERISA, employee rights must vest after a statutorily defined period; they may no longer remain contingent on the employee's actions. Employers may not circumvent that congressional purpose by arguing that a disappointed beneficiary did not qualify as an employee because his or her expectations were limited by forfeitability provisions.

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8 We do not accept Darden's contention that our consideration of the argument is improper because the issue was not raised before the magistrate. The argument was sufficiently advanced when it was raised before the district court in Nationwide's Objection to the Magistrate's Memorandum and Recommendations.

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